91-1525

Supreme Court, U.S.
FILED
MAR 18 1992
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1991

NEW MEDICO HEALTH CARE CENTER OF MICHIGAN, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Court of Appeals for the Sixth Circuit erred by enforcing an Order of the National Labor Relations Board, where the Board misapplied and improperly expanded the doctrine of successorship by:

I. Making a successorship determination at a time when there was no certified or recognized collective bargaining representative at the predecessor employer's facility;

II. Making a successorship determination before the Union demanded recognition or bargaining; and

III. Submitting the successorship issue, which involved unfair labor practice issues, for determination by a hearing officer in a representation proceeding, rather than submitting it for decision by an administrative law judge in an unfair labor practice proceeding.

LIST OF PARTIES

The parties to this cause of action in the Court of Appeals for the Sixth Circuit were:

1. The National Labor Relations Board; and

2. New Medico Health Care Center of Michigan, Inc. (now known as New Medico Neurologic Center of Michigan, Inc.), a wholly-owned subsidiary of New Medico Associates, Inc.

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The Order of the Sixth Circuit Court of Appeals in *National Labor Relations Board v. New Medico Health Center of Michigan, Inc.*, No. 91-5271, dated December 20, 1991, is an unreported decision and is reproduced as Appendix A.

The Decision and Order of the National Labor Relations Board captioned *New Medico Health Care Center of Michigan, Inc.*, is reported at 229 N.L.R.B. No. 50 (August 9, 1990) and is reproduced as Appendix C.

JURISDICTIONAL STATEMENT

Petitioner seeks review of the December 20, 1991 Order of the United States Court of Appeals for the Sixth Circuit, enforcing an Order of the National Labor Relations Board, reported at 299 N.L.R.B. No. 50. The Court of Appeals has decided an important issue of federal law involving application of the successorship doctrine in a way that improperly expands precedent of this Court, and thus should be reviewed and settled by this Court. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The present case involves interpretation of the National Labor Relations Act, 29 U.S.C. §§ 157 and 158, which provides in relevant part:

29 U.S.C. § 157 (Section 7 of the Act). Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

29 U.S.C. § 158 (Section 8(a)(5) of the Act).

(a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer –

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

STATEMENT OF THE CASE

This case arises out of an election that was conducted by the National Labor Relations Board (the "Board"), pursuant to a representation petition filed by the American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME" or the "Union"), at a health care facility located at 3003 W. Grand River Avenue, Howell, Michigan. At the time of the election, the facility was leased and operated by Greenbriar Care

Center, Inc. ("Greenbriar"), which was the employer of the employees involved in that election.

On March 1, 1989, Petitioner, New Medico Health Care Center of Michigan, Inc. (now known as New Medico Neurologic Center of Michigan, Inc. and referred to herein as "New Medico") commenced operations at the Howell facility. The primary issue involved in the instant proceeding is whether the National Labor Relations Board erred in its application of the successorship doctrine to require New Medico to recognize and bargain with AFSCME pursuant to the results of the election involving Greenbriar's employees.

The Operations of Greenbriar

Greenbriar was a Michigan corporation, and a wholly-owned subsidiary of Care Centers of Michigan, Inc. ("CCM"). CCM is a Michigan corporation headquartered in Farmington Hills, Michigan, and is wholly owned by Dr. Edwin C. Blumberg. Greenbriar primarily provided geriatric nursing care, and was one of nine nursing homes owned by CCM. Greenbriar did not share any common officers with New Medico, and there was no common ownership between the two companies, (HO at A35).[1]

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[1] References to the hearing officer's report are designated as HO. References to the Decision and Certification of Representative of the National Labor Relations Board are designated as REP. References to the Decision and Order of the National Labor Relations Board are designated as BD. References to the Order of the Court of Appeals for the Sixth Circuit are designated as CA. All page cites refer to the Appendix included herein.

Greenbriar leased the Howell facility from a real estate investment trust called the Health and Rehabilitation Properties Trust ("HRPT") until February 28, 1989. HRPT is a publicly traded corporation, which owns a number of health care properties that it either sells or leases to various health care providers. Greenbriar's lease for the Howell facility was terminated by HRPT effective February 28, 1989, due to Greenbriar's failure to make its payments, (HO at A31; CA at A3).

The Operations of New Medico

New Medico is a Delaware corporation, and a wholly-owned subsidiary of New Medico Health Care Associates, Inc. ("NMA"), (HO at A29). NMA is also a Delaware corporation with 90% of its stock owned by Charles Braddick, and the remaining 10% of the stock owned by family and friends of Braddick, (HO at A30). NMA's headquarters are located in Boston, Massachusetts.

NMA specializes in the treatment and rehabilitation of patients with serious closed-head injuries, and operates 47 health care facilities in 15 states. Prior to purchasing the Howell facility, NMA employed approximately 7,000 individuals, (HO at A29-30). NMA's purchase of the Greenbriar facility was intended to permit New Medico to become a major provider of such services out of the Howell, Michigan facility.

Neither New Medico, its parent company, NMA, nor Braddick have any ownership interest in HRPT, but merely have a history of leasing and purchasing facilities from HRPT pursuant to various arms-length transactions.

New Medico's Negotiations with HRPT to Lease the Howell Facility

In late January of 1989, NMA's President, Jeffrey Goldshine, was contacted by Mark Finkelstein, a manager of HRPT's leasing division, and was advised that the tenant at the Howell, Michigan facility (Greenbriar) was operating a skilled nursing home but had defaulted on rent payments, (HO at A31; CA at A3). Finkelstein asked Goldshine if NMA would be interested in leasing the Howell property from HRPT and running a health care facility there, (HO at A31).

Since New Medico was interested in establishing a closed-head injury treatment and rehabilitation center in Michigan, Goldshine entered into negotiations for a lease with HRPT for the Howell facility, which resulted in an agreement being reached between NMA and HRPT on Friday, February 17, 1989, (HO at A31; CA at A3). The agreement consisted of a three-year lease, with rental payments to begin March 1, 1989, (HO at A32; CA at A3). All negotiations for this lease were conducted exclusively between representatives of New Medico and HRPT. NMA had no contact with the principals of Greenbriar or CCM before entering into the lease agreement with HRPT, (HO at A32).

On Monday, February 22, 1989, NMA representatives visited the Howell facility to determine what needed to be done in order to begin running the facility on March 1, 1989. During that visit, NMA found out for the first time that an NLRB election had been held on February 17, 1989 between Greenbriar and AFSCME, (HO at A31). They also learned of a 21 page report of deficiencies from the

State of Michigan against Greenbriar concerning various patient care matters, (HO at A31). NMA's President, Jeffrey Goldshine, was on vacation the week of February 19, so did not learn of the election until February 27, 1989, (HO at A31).

The Beginning of Operations by New Medico

On March 1, 1989, a three-year lease between New Medico and HRPT for the Howell facility was executed, and New Medico began operations at the facility, (HO at A32; CA at A3). At that time, the first and only negotiations between representatives of New Medico and representatives of Greenbriar were conducted, as New Medico purchased a small amount of consumable supplies from Greenbriar, including bandages and catheters, for use at the facility, (HO at A32).

When New Medico began operations at the Howell facility, there was no recognized or certified collective bargaining representative in existence. Although the NLRB election involving Greenbriar's employees had been held, the results of that election had not yet been determined because of the Union's unresolved challenges and objections. As a result, AFSCME made no demand at that time that New Medico recognize or bargain with it as the exclusive representative of any of New Medico's employees.

Due to the nature of the industry and the need to provide continuing care for the patients in the Howell facility which became New Medico's responsibility effective March 1, 1989, New Medico offered employment to

all of Greenbriar's employees, except for its administrator, (HO at A32; CA at A3). Most of Greenbriar's employees accepted positions with New Medico. New Medico also began hiring additional employees, (HO at A32; CA at A3). Even so, New Medico could not properly care for all of the patients in the facility at that time, so some were transferred to hospitals, (HO at A32).

After assuming operations at the Howell facility, New Medico made significant changes in operations from those employed by Greenbriar, including the elimination of Greenbriar's practice of utilizing aides from other facilities, the reduction of overtime, and the implementation of incentives in order to attract employees. Such incentives included an increase in wage rates of $.75 to $2.00 per hour, a shift premium of $.25 per hour, a special care unit premium of $.50 per hour, and a bonus program to reward employees for attracting new employees to the facility, (HO at A33). In addition, New Medico immediately began correcting the problems listed on the 21 page deficiency report from the State of Michigan, (CA at A3).

New Medico's Planned Changes for the Facility

In order to establish a facility specializing in the rehabilitation and treatment of traumatic brain injuries, New Medico planned to completely renovate and reconstruct the Howell facility and add significant amounts of new equipment, (HO at A33; CA at A4). New Medico's plans called for a reduction of the number of beds from approximately 180 to 160 to provide space for rehabilitation programs and to provide for about 40 beds, or one-

quarter of the total, which would be designated for traumatic brain injury patients, (HO at A34).

New Medico's plans also called for a dramatic increase in the number of employees, (HO at A34; CA at A4). The number of nursing assistants was to double, and additional physical therapists and respiratory therapists were to be hired, (HO at A34). The addition of a rehabilitation department was to result in a substantial increase in aides in the following departments: dietary, housekeeping, activities, physical therapy, and recreational therapy. (HO at A34). In addition, a number of new classifications and departments were to be added so that New Medico could employ occupational therapists, occupational therapy aides, speech pathologists, vocational counselors, social workers, psychologists, mental health aides, special educators, special education aides, and transportation aides, (HO at A34). No determination was made as to how many of New Medico's new employees should properly be included in the bargaining unit. However, as of March 9, 1989, slightly more than one week after commencing operations, New Medico employed approximately 134 unit employees, all but four of whom previously worked for Greenbriar, (HO at A34, fn. 12).

The Representation Proceeding

On December 15, 1988, AFSCME filed a petition with the National Labor Relations Board in Case No. 7-RC-18856 seeking to represent a unit of employees employed by Greenbriar at the Howell facility. AFSCME

and Greenbriar entered into a Stipulated Election Agreement, which was approved by the NLRB's Regional Director for the Seventh Region on January 6, 1989.

On February 17, 1989, before any NMA officials visited the Howell facility in anticipation of purchasing it and ten days before NMA's president learned that a petition had been filed, the NLRB conducted an election in the following bargaining unit:

> All full-time and regular part-time nurses aides, physical therapy aides, laundry employees, activity employees, dietary aides, cooks, housekeeping employees, ward clerks, and maintenance employees *employed by Greenbriar* at its facility located at 3003 W. Grand River Avenue, Howell, Michigan; but excluding all LPNs, RNs, technical employees, respiratory therapists, office clerical employees, casual employees, temporary employees, guards, and supervisors as defined in the Act. (Emphasis added).

Of the approximately 106 employees eligible to vote in that election, 41 cast ballots for, and 37 against, the Union. Ten ballots cast during the election were challenged by the Union, a number sufficient to determine the outcome of the election, (HO at A27). In addition, AFSCME filed objections to the election.

When New Medico commenced operations at the facility on March 1, 1989, the NLRB was still conducting a preliminary investigation of the challenged ballots and objections. Thereafter, the Regional Director for Region 7 scheduled a hearing concerning the challenges. The objections were withdrawn. In ordering the hearing concerning the challenges, the Regional Director ordered the

Hearing Officer to also take evidence on the successorship issue, and any bargaining obligations imposed upon New Medico as a result thereof, (HO at A28-29). New Medico offered to stipulate to a prompt election for its employees, to determine whether they were in fact interested in AFSCME representation. This offer was rejected by both AFSCME and the NLRB Regional Office.

A hearing was held before Hearing Officer Raymond Kassab on March 30 and 31, and April 3, 1989. The Hearing Officer issued his Report and Recommendations on Challenged Ballots and Successorship on July 28, 1989. The Hearing Officer recommended, among other things, that the results of the election be certified, indicating that the Union had received a majority of the ballots cast. The Hearing Officer further recommended that New Medico be found to be a successor to Greenbriar and therefore be required to bargain with the Union for employees in the bargaining unit as set forth in the Stipulated Election Agreement between AFSCME and Greenbriar, (HO at A69).

On March 1, 1990, the NLRB issued its Decision and Certification of Representative, adopting the Hearing Officer's findings and recommendations, (REP at A13-14). However, the NLRB's March 1, 1990 certification concerned Greenbriar's, not New Medico's, employees. The certification reads as follows:

> All full-time and regular part-time nurses aides, physical therapy aides, laundry employees, activity employees, dietary aides, cooks, housekeeping employees, ward clerks, and maintenance employees *employed by Greenbriar* at its facility located at 3003 W. Grand Avenue, Howell, Michigan; but excluding all

> LPNs, RNs, technical employees, respiratory therapists, office clerical employees, casual employees, temporary employees, guards and supervisors as defined in the Act. (REP at A14-15, emphasis added).

On March 26, 1990 the NLRB issued an "Order Correcting" in which, without explanation, it replaced Greenbriar with New Medico in the unit description, (see Appendix G).

The Unfair Labor Practice Proceeding

On March 7, 1990, AFSCME demanded, for the first time, that New Medico recognize and bargain with it, as the successor to Greenbriar, for the employees in the bargaining unit involving Greenbriar's employees. New Medico declined, indicating that it believed the certification by the Board to be in error. New Medico did, however, again offer to stipulate to an election for its employees. This offer was again rejected by both AFSCME and the Board.

On March 22, 1990, AFSCME filed an unfair labor practice charge in Case No. 7-CA-30357 alleging that New Medico violated § 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158.5, by refusing to bargain. Thereafter, the Board's General Counsel moved for summary judgment. On August 9, 1990, the Board issued its Decision and Order, reported at 299 N.L.R.B. No. 50, granting the General Counsel's Motion for Summary Judgment and ordering New Medico to recognize and bargain with AFSCME, (BD at A18, 20). The stated basis for the Board's decision was that no representation issues were raised that could properly be litigated in an unfair labor practice

proceeding, (BD at A17; CA at A5). Thus, no independent investigation was conducted with respect to the successorship issue, and the matter was never presented to or ruled upon by an administrative law judge.

On March 4, 1991, the Board applied to the United States Court of Appeals for the Sixth Circuit for enforcement of its Order pursuant to Section 10(e) of the Act, 29 U.S.C. § 160(e). On December 20, 1991, the Court of Appeals enforced the NLRB's Order, (CA at A12). With respect to the successorship issue, the Court of Appeals determined that the Hearing Officer correctly analyzed the successorship issue as of March 1, 1989, when New Medico commenced operations at the facility, rather than requiring such analysis to be conducted at a time when the Union was certified and demanded bargaining. According to the Sixth Circuit, "Any other position only encourages new owners to circumvent its obligations by filing challenges to certification." (CA at A8). The Court of Appeals also rejected New Medico's request for a hearing before an administrative law judge, concluding that the Hearing Officer could properly determine that New Medico participated in unfair labor practices, (CA at A9).

The Court of Appeals' mandate issued on January 13, 1992. New Medico's Motion to Recall Mandate was denied by the Court of Appeals on February 3, 1992.

REASONS FOR GRANTING THE WRIT

By enforcing the National Labor Relations Board's Order requiring New Medico to recognize and bargain with AFSCME as a successor employer, the U.S. Court of

Appeals for the Sixth Circuit has sanctioned an extreme departure from the precedent of this Court with respect to the successorship doctrine, and has decided an important issue of Federal labor law which should be settled by this Court.

ARGUMENT

The Court of Appeals for the Sixth Circuit Erred by Enforcing an Order of the National Labor Relations Board, Which Misapplied and Improperly Expanded the Successorship Doctrine.

The election in this case was held pursuant to a Stipulated Election Agreement between AFSCME and Greenbriar, and involved the employees of Greenbriar, not New Medico. Nevertheless, the Board determined that the results of the election should be binding upon New Medico, pursuant to the successorship doctrine.

The Board, with approval from the Circuit Court of Appeals for the Sixth Circuit, failed to properly apply the successorship doctrine in this case. First, the Board erred by analyzing the successorship issue at a time when there was no recognized or certified collective bargaining representative at the Howell facility, and no demand by AFSCME upon New Medico for recognition or bargaining. The Board also erred by submitting the successorship issue, which resulted in the finding that New Medico committed an unfair labor practice, for determination by a hearing officer in a representation proceeding, rather than submitting it for decision by an administrative law judge in an unfair labor practice proceeding.

I. The National Labor Relations Board Erred in Making the Successorship Determination at a Time When No Certified or Recognized Collective Bargaining Representative Existed at the Howell Facility.

This Court first dealt with the issue of a successor employer's obligation to bargain with a union that had represented the employees of its predecessor in *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972). Focusing on the "precise facts" involved in *Burns*, this Court determined that the Board and the U.S. Court of Appeals properly determined in that case that Burns, as a successor employer to the Wackenhut Corporation, violated Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act by refusing to recognize and bargain with the United Plant Guard Workers of America (UPGWA).

Critical to this Court's decision in *Burns* was the fact that the employees of the predecessor employer, the Wackenhut Corporation, had only a few months prior to the change in operations selected the UPGWA as their collective bargaining representative in an NLRB election, and the UPGWA had been certified by the Board prior to the time that Burns took over.

In explaining its decision to require Burns to recognize and bargain with the union, this Court stated as follows:

> Burns' obligation to bargain with the union over terms and conditions of employment stemmed from its hiring of Wackenhut's employees and from the recent election *and Board certification*. (Emphasis added).

Id. at 278 and 279.

This Court also stated that in evaluating the bargaining obligations of Burns as a successor employer, it was "imperative that the situation be viewed as it was when Burns hired its employees for the guard unit, *a majority of whom were represented by a Board-certified union.*" (Emphasis added). *Id.* at 280. This Court further stated that "it would be different if Burns *had not hired employees already represented by a union certified as a bargaining agent. . . .* " (Emphasis added). *Id.* at 280.

In *Fall River Dyeing & Finishing Corp. v. NLRB,* 482 U.S. 27 (1987), this Court again addressed the successorship doctrine to decide issues left open in *Burns,* because of the "importance of the successorship issue in labor law. . . . " *Id.* at 36.

In *Fall River,* the union had represented a unit of employees at the Sterlingwale Corporation for over 30 years. In February 1982, all of Sterlingwale's employees, who at that time were still covered by a collective bargaining agreement between the company and the union, were laid off. Sterlingwale was thereafter liquidated. In September 1982, Fall River began operating out of Sterlingwale's facilities, and initially sought to hire one shift of approximately 55 to 60 employees with a goal of later adding a second shift if business permitted.

When the union demanded that Fall River recognize and bargain with it in October of 1982, Fall River had 21 employees, 18 of whom had previously worked for Sterlingwale. Fall River refused the union's demand. Fall River continued expanding its workforce, and by January it had attained its goal of one shift of workers, a majority of whom had previously worked for Sterlingwale. It was

not until mid-April 1983 that Fall River had, for the first time, more employees who had not been employed by Sterlingwale than employees who had.

Of primary importance in the instant case is this Court's analysis in *Fall River* of the application of the successorship doctrine where, unlike the situation in *Burns,* the union had not been recently certified. This Court concluded that a successor's obligation to bargain was not limited to a situation where the union in question had been recently certified, but rather would extend also to a situation where the union "has a rebuttable presumption of majority status." *Fall River, Id.* at 41.

As this Court explained in *Fall River,* there are two presumptions following the certification of a union. First, after a union has been certified by the Board as a bargaining unit representative, it usually is entitled to a conclusive presumption of majority status for one year following the certification. Second, after this one-year period expires, the union is entitled to a rebuttable presumption of majority status. In *Fall River,* this Court recognized the importance of these presumptions in the successorship situation, stating as follows:

> The rationale behind the presumptions is particularly pertinent in the successorship situation and so it is understandable that the Court in *Burns* referred to them. During a transition between employers, a union is in a peculiarly vulnerable position. It has no formal and established bargaining relationship with the new employer, is uncertain about the new employer's plans, and cannot be sure if or when the new employer must bargain with it. While being concerned with the future of its members

> with the new employer, the union also must protect whatever rights still exist for its members under the collective-bargaining agreement with the predecessor employer. Accordingly, during this unsettling transition period, the union needs the presumptions of majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor.

Id. at 39.

It was the first presumption, the one-year conclusive presumption following certification, that the Court in *Burns* relied upon in determining that the successor employer must recognize and bargain with the representative of the predecessor's employees. In *Fall River,* a similar conclusion was reached based upon the second presumption, the rebuttable presumption following expiration of this one-year period. In the instant case, AFSCME was not entitled to either presumption at the time that the Board made its successorship determination. The Union had not been recognized or certified as the representative of any employees at the Howell facility on March 1, 1989 when New Medico commenced operations, and no collective bargaining relationship existed between AFSCME and Greenbriar. Nevertheless, the Board and the Court of Appeals determined that it was appropriate to make a successorship determination as of that date. This determination not only has no precedential support, a fact recognized by the Court of Appeals, but is in conflict with this Court's decisions in *Burns* and *Fall River.*

In explaining why it was requiring New Medico to bargain with AFSCME despite the absence of precedent

for its position, the Court of Appeals stated that it could "think of no reason" why the determination of the successorship issue should be made only after certification of a union. However, this Court gave such reasons in its decision in *Fall River,* when discussing the policy considerations for requiring that a union enjoy a presumption of majority status for the predecessor's employees before a successor employer will be required to bargain with it. In this regard, this Court stated as follows:

> These presumptions are based not so much on an absolute certainty that the union's majority status will not erode following certification, as on a particular policy decision. The overriding policy of the NLRB is "industrial peace." The presumptions of majority support further this policy by "promot[ing] stability in collective-bargaining relationships, without impairing the free choice of employees."

Fall River, 482 U.S. at 38 (citations omitted).

Since there was no collective bargaining relationship at all between Greenbriar and AFSCME, application of the successorship doctrine will not further the Act's policy of promoting industrial peace. However, it will seriously undermine the Act's further policy of employee free choice.

Prior to March 1, 1989, employees at the Howell facility were employed by an employer that could not pay its bills, had been written up by the State of Michigan for deficiencies that took 21 pages to list, and was otherwise placing the employees in a very unstable work environment. It was under these circumstances that 43 of Greenbriar's approximately 106 employees at the time of the

election voted for union representation, a number ultimately certified as a majority (by one vote) of the valid votes counted. By March 9, 1989, New Medico employed over 130 employees in the bargaining unit in question.

Although New Medico took over the same physical facility as Greenbriar, and continued to care for its patients, there was not a substantial continuity of the same operations. Rather, the facility was to be radically redesigned, remodeled, and reconstructed to provide the superior care and rehabilitation services for traumatic closed head injury cases, a practice foreign to Greenbriar but within New Medico's specialty. In order to begin to implement those changes, New Medico applied for its own license, and began to establish its own relationship with suppliers and providers of services. Once New Medico corrected the 21 page list of deficiencies assessed by the State of Michigan against Greenbriar, and could start admitting new patients, its operations were to be vastly more than those of a geriatric nursing home which was run by Greenbriar. As such, New Medico's operations required the use of vast amounts of new technology and equipment in order to render the different services that it would provide, as compared to the limited services provided by Greenbriar.

The jobs provided by New Medico were also very different and under different conditions than those that were present under Greenbriar. New Medico assigned its own administrator to the facility effective March 1, 1989, and also began working under its rules and procedures which are established and controlled by NMA in Boston. Unlike Greenbriar, New Medico had the financial

resources needed to develop the Howell facility into a first-class provider of health care and rehabilitation.

In order to demonstrate its commitment to its employees at the Howell facility, New Medico immediately, upon beginning operations, established much higher wage rates for its employees, resulting in $.75-$2.00 per hour increases over former Greenbriar rates for employees in the bargaining unit. New Medico also added significant benefits: $.25 per hour shift premiums, $.50 per hour special care unit premiums, and a bonus program to reward employees for attracting new employees to the facility. In addition, New Medico eliminated many Greenbriar practices.

The types of employees employed by New Medico in comparison to those employed by Greenbriar also changed dramatically after New Medico assumed operations of the facility. New classifications of occupational therapists, occupational therapy aides, speech pathologists, vocational counselors, social workers, psychologists, mental health aides, special educators, special education aides, and transportation aides were added, as were larger numbers of nursing assistants, physical therapists, respiratory therapists, dietary aides, housekeeping aides, activities aides, physical therapy aides, and recreational therapy aides. Many of the new classifications may appropriately have been included in the stipulated bargaining unit had they been in existence when the unit description was agreed upon between Greenbriar and AFSCME.

In view of these significant changes, it cannot be said that, viewed from the perspective of the employees, their

job situation remained basically unaltered. See *Fall River*, 482 U.S. at 43; *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973). Rather, there is a serious question concerning the attitude that these employees may have toward representation, which only an election can resolve. Indeed, within a week after commencing operations at the Howell, Michigan facility, New Medico employed approximately 134 employees in the classifications set forth in the bargaining unit description agreed upon between Greenbriar and the Union, only 43 of whom had cast votes in favor of union representation. For this reason, New Medico immediately offered to stipulate to another election, in order to give its employees the free and fair choice of bargaining representative guaranteed by Section 7 of the NLRA.

Since there was no existing collective bargaining relationship between Greenbriar and the Union at the time that New Medico commenced operations at the facility, the Act's equally important policy of promoting employee free choice should have been paramount in this case. The Regional Office of the Board should simply have scheduled another election between New Medico and AFSCME, so that this matter would have been resolved without interfering with the right of free choice of New Medico's employees.

II. The National Labor Relations Board Erred by Making a Successorship Determination Before the Union Demanded Recognition or Bargaining.

As discussed above, when New Medico began operation at the Howell facility on March 1, 1989, there was no

union certified or recognized as the bargaining representative for any employees at that facility. It was not until March 1, 1990, that the Union was certified to represent a unit of Greenbriar's employees. Thus, there was no demand by AFSCME until March 7, 1990 that New Medico recognize or bargain with it as a successor employer to Greenbriar.

The presence or absence of a bargaining demand is crucial in determining when an evaluation of the composition of a successor's workforce under this Court's *Burns* decision is to be made. This Court answered that question in *Fall River,* when it accepted the "substantial and representative complement" rule utilized by the Board. Under this rule, the Board must determine whether the job classifications were filled or substantially filled and whether the operation was in normal or substantially normal production before it will evaluate a successor's workforce for purposes of determining majority status under *Burns. Fall River,* 482 U.S. at 49; See also *Premium Foods, Inc. v. NLRB,* 709 F.2d 623, 628 (9th Cir. 1983).

In applying the substantial and representative complement rule in *Fall River,* this Court also stated as follows: "The successor's duty to bargain at the 'substantial and representative complement' date is triggered only when the union has made a bargaining demand." *Fall River,* 482 U.S. at 52. See also *Decor Noel, Inc.,* 283 N.L.R.B. 911, 915, 125 L.R.R.M. 1136 (BNA) (1987).

Since the Hearing Officer made the successorship determination as of March 1, 1989, when New Medico first began operations at the Howell facility, he could not, and did not, properly answer the question as to whether

a substantial and representative complement of employees had been hired as of March 7, 1990, when the Union demanded recognition. Nor did he make a proper determination as to whether on that date New Medico employed in the bargaining unit a majority of employees who had previously worked for Greenbriar.

The Hearing Officer's reliance on *Premium Foods, Inc. v. NLRB, supra,* and *NLRB v. Hudson River Aggregates, Inc.,* 639 F.2d 865 (2nd Cir. 1981) as support for his conclusion that the proper time for determining whether a substantial and representative compliment of employees existed was when new Medico took over the operations is misplaced. Unlike the instant case, in both *Premium Foods* and *Hudson River Aggregates,* a union represented a unit of the predecessor's employees at the time of the sale of the business. In both cases, the unions made demands upon the successor employers for recognition, and the Board concluded that a substantial and representative complement of employees existed as of the date when the bargaining demand was made.

Since the NLRB did not, and could not, consider whether, at the time that AFSCME demanded bargaining, New Medico employed a substantial and representative complement of employees, a majority of whom had previously been employed by Greenbriar, it improperly ordered New Medico to recognize and bargain with the Union as a successor employer.

III. The National Labor Relations Board Erred by Improperly Submitting the Successorship Issue, Which Involved Unfair Labor Practice Issues, for Determination by a Hearing Officer in a Representation Proceeding, Rather Than Submitting it for Decision by an Administrative Law Judge in an Unfair Labor Practice Proceeding.

When an employer is accused of committing an unfair labor practice under the Act, the Board has the authority to issue a formal complaint. See Section 10(b) of the Act, 29 U.S.C. §160(b). When such a complaint is issued, NLRB Rules and Regulations, Series 8, as amended, Section 102.34, provide for a hearing before an administrative law judge. The specific rule reads as follows:

> Sec. 102.34. *Who shall conduct; to be public unless otherwise ordered.* – The hearing for the purpose of taking evidence upon a complaint *shall be conducted by an administrative law judge.* . . . (Emphasis added.)

In this case, New Medico was denied an opportunity for such a hearing, because the Board determined that "[A]ll representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding." Thus, the Board granted the motion of the General Counsel for summary judgment.

The Board's decision in this respect apparently relies upon the general principle that, where representation case findings are "related" to subsequent unfair labor practice proceedings, such findings may not be relitigated in an unfair labor practice hearing. *Serv-U-Stores, Inc.*, 234

N.L.R.B. 1143, 97 L.R.R.M. 1414 (BNA) (1978); Section 102(f) of the Board's Rules and Regulations.

In the instant case, the representation issues which may properly be determined to be "related" to the unfair labor practice case would involve only the eligibility of various employees.[2] Once the representation issues are properly resolved, the Board may then determine whether a majority of an employer's employees selected a union as their collective-bargaining representative. That is precisely what happened in the instant case, when the Board issued its decision and certification of representative on March 1, 1990, certifying AFSCME as the exclusive collective-bargaining representative for a unit of Greenbriar's employees. The Board's error occurred 25 days later when, without explanation, it "corrected" its certification to cover New Medico's employees.

It is only after a certification issues and a union's demand for bargaining is rejected by an employer that unfair labor practice issues arise under Section 8(a)(5) of the Act, which makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees.

In the instant case, the Board relied upon the successorship finding of the hearing officer in determining that an unfair labor practice had been committed under Section 8(a)(5) of the Act. No independent investigation

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[2] The supervisory status of Susan Griffin, whose challenged ballot was an issue in this case, would be such a "related" issue that Petitioner agrees could not properly be relitigated in an unfair labor practice proceeding.

was conducted by the Board concerning the successorship issue as of March 7, 1990 when the Union demanded recognition, and no hearing was held before an administrative law judge.

The Court of Appeals, in enforcing the Board's order, simply held that, since it had decided that the hearing officer could determine the successorship issue before resolution of challenges to a representation election, the hearing officer in a representation case "may also determine prior to resolution of challenges to a representation election that New Medico participated in unfair labor practices." The Court of Appeals decision in this regard is erroneous in at least two respects. First, it simply compounds its error in determining that the successorship issue may be analyzed prior to a time when a certified or recognized bargaining representative exists, and prior to any demand by such bargaining representative that the successor employer recognize and bargain with it. In addition, the Court of Appeals' decision in this regard is in direct conflict with rules concerning NLRB procedure.

The National Labor Relations Board Casehandling Manual, Part 2, Representation Proceedings, Section 11420.1, provides as follows:

> *Procedures if Unfair Labor Practice Charge is Involved:* In the event there are objections to an election and unfair labor practice charges, both of which cover, in whole or in part, the same grounds, the complaint and objections normally should be *consolidated* for hearing.
>
> In such case (and even though challenges also may be consolidated), the procedures applicable to the hearing are mixed. To the extent that

> the alleged unfair labor practices are involved, the procedures set forth in Sections 10380-10412 should be adhered to; to the extent that objections (and/or challenges), the substance of which does not coincide with the substance of the alleged unfair labor practices, are involved, the procedures set forth in this section should be adhered to; to the extent that there is overlapping, ambiguity, or conflict, the procedures set forth in Sections 10380-10412 should be adhered to.

In this case, the unfair labor practice issue is whether New Medico violated Section 8(a)(5) of the Act by refusing to bargain with AFSCME as a successor employer to Greenbriar. This issue is conditional upon a finding of successorship. Thus, pursuant to Section 11420.1, the issues were to be consolidated for hearing, and procedures set forth in Sections 10380-10412 of the National Labor Relations Board's Casehandling Manual, Part 1, Unfair Labor Practice Proceedings, governs. Those sections apply to the hearing procedure in unfair labor practice proceedings before an administrative law judge. Section 10380 provides as follows:

> *Rule and Conduct of Trial Attorney*: The trial attorney is an advocate. As the representative of the General Counsel, who has caused a complaint to be issued, it is his/her duty to introduce admissible evidence which will support the allegations of the complaint.

By contrast, the role of a hearing officer in a representation hearing is defined in National Labor Relations Board Casehandling Manual, Part 2, Representation Proceedings, at Section 11424.3, as follows:

> The hearing officer is *not* an advocate of any position. He/She must be impartial in his/her rulings and in his/her conduct both on and off the record. (Emphasis in the original.)

The above sections of the National Labor Relations Board's Casehandling Manuals clearly indicate that, where unfair labor practice issues are involved, such issues are to be heard by an administrative law judge, and not a hearing officer in a representation case, because of the contrasting nature of the proceedings.

That a hearing officer in a representation proceeding cannot determine unfair labor practice issues has been a long and well-recognized principle in labor law. As such, National Labor Relations Board Casehandling Manual, Part Two, Representation Proceedings, §11228 specifically precludes even evidence of unfair labor practices from being admitted into evidence by a hearing officer. See also *Foothill Electric Corp.*, 120 N.L.R.B. 1350, 42 L.R.R.M. 1184 (BNA) (1958); *Lawrence Typographical Union v. McCulloch*, 349 F.2d 704 (D.C. Cir. 1965). The Court of Appeals' determination that "the hearing officer may also determine . . . that New Medico participated in unfair labor practices" is a substantial departure from this recognized principle.

For these reasons, the Board's failure to investigate the successorship issue as of the time that New Medico rejected the Union's demand for bargaining, and to afford New Medico an opportunity to defend against unfair labor practice allegations in a hearing before an administrative law judge, was in error.

PRAYER FOR RELIEF

Petitioner, New Medico Health Care Center of Michigan, Inc., respectfully requests that this Honorable Court grant its Petition for Writ of Certiorari, or alternatively remand this case to the National Labor Relations Board for a hearing before an administrative law judge on the unfair labor practice issue.

Dated: March 16, 1992

Respectfully submitted,

ABBOTT, NICHOLSON, QUILTER,
ESSHAKI & YOUNGBLOOD, P.C.

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APPENDIX A

NOT FOR PUBLICATION

91-5271

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	ON PETITION TO
	)	REVIEW AND ENFORCE
Plaintiff-Appellant,	)	AN ORDER OF THE
	)	NATIONAL LABOR
v.	)	RELATIONS BOARD.
	)	(Filed
NEW MEDICO HEALTH CARE CENTER OF MICHIGAN, INC.,	)	Dec. 20, 1991)
	)	
Defendant-Appellee.	)	

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situation. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

BEFORE: KEITH and NELSON, Circuit Judges; and HOOD, District Judge.*

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* The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

PER CURIAM: Plaintiff-appellant, National Labor Relations Board ("NLRB" or "BOARD") requests that this Court enter a judgment enforcing its order requiring New Medico Health Care Center of Michigan, Inc. ("New Medico") to engage in collective bargaining. The NLRB ruled that New Medico violated Section 8(a)(5) and (1) of the National Labor Relations Act ("the Act") (29 U.S.C. 158(a)(5) and (1)) by refusing to bargain with the American Federation of State, County and Municipal Employees ("AFSCME") after it had been certified by the NLRB as the exclusive bargaining representative of an appropriate unit of New Medico's employees. For the reasons stated below, we **ENFORCE** the order of the Board.

I

In December 1988, AFSCME filed a petition with the NLRB seeking to represent a unit of employees at Greenbriar Care Center ("Greenbriar") in Howell, Michigan. Pursuant to a stipulated election agreement, the NLRB conducted an election by secret ballot among the unit employees of Greenbriar on February 17, 1989.** A tally

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** The bargaining unit was defined as follows:

All full-time and regular part-time nurses aides, physical therapy aides, laundry employees, activity employees, dietary aides, cooks, housekeeping employees, ward clerks and maintenance employees employed by Greenbriar at its facility located at 3003 W. Grand River Avenue, Howell, Michigan; but excluding all LPNs, RNs, technical employees, casual employees, temporary employees, guards, and supervisors as defined by the Act

of the ballots showed that of the 88 valid votes cast, 41 were for AFSCME and 37 were against it. AFSCME challenged the remaining 10 ballots, leaving the outcome of the union election in doubt.

Greenbriar leased the real property at the Howell site from Health and Rehabilitation Properties Trust ("HRPT"), a Maryland real estate investment trust. In January 1989, a HRPT official contacted New Medico Health Care Associates, Inc. ("NMA"), New Medico's parent company, and asked if NMA would be interested in becoming the tenant of the Greenbriar facility because Greenbriar had failed to meet its lease obligations. On February 17, 1989, new Medico agreed to a three-year lease beginning on March 1, 1989.

On February 27, 1989, Greenbriar employees were notified by letter of New Medico's impending assumption of Greenbriar's lease. The letter encouraged Greenbriar employees to apply for positions with New Medico. Employees were told that New Medico would consider years of service with Greenbriar to establish the wage rate for hired employees. New Medico's wages were higher than Greenbriar's. The letter further stated that employees would receive credit for their seniority cumulated at Greenbriar. New Medico hired virtually all of Greenbriar's employees and supervisors. The one known exception was Greenbriar's administrator, who apparently declined New Medico's offer. Moreover, New Medico continued to care for Greenbriar's former patients.

During this same period, New Medico began correcting problems listed on a 21 page deficiency report from the State of Michigan. According to NMA's president [sic]

testimony, New Medico planned to make substantial changes at the facility. Such changes included upgrading the facility and hiring twice the number of employees to accommodate a greater focus on the treatment and rehabilitation of traumatic head injuries. He testified that these changes would be completed in about two years.

A NLRB hearing was scheduled to resolve the controversy surrounding the ten challenged ballots, and thus the outcome of the election. Prior to the commencement of the hearing, AFSCME withdrew challenges to five of the ten remaining ballots. The tally was now 43 for AFSCME, 40 against and five challenged ballots. At the hearing, however, the parties agreed to stipulate to four of the remaining five challenged ballots. The parties stipulated that the challenges to the ballots cast by Christine Schullar and Margie Kuhn be overruled and that their ballots be opened and counted. The parties also stipulated that the ballots cast by Joan Kehres and Barbara McCreary be sustained, and that their ballots not be counted. The remaining ballot was that of Susan Griffin ("Griffin"). AFSCME challenged Griffin's ballot on the grounds that she worked as a supervisor at Greenbriar.

At the hearing, several former Greenbriar employees testified that Griffin exercised supervisory powers over employees. These testimonies revealed that Griffin hired, disciplined and made schedule changes. Griffin's supervisor, however, testified that Griffin did not exercise independent authority.

The hearing officer issued a Report on July 28, 1989, finding that New Medico was a successor to Greenbriar, and that Griffin was a supervisor within the meaning of

§ 2(11) of the Act. The hearing officer also recommended that the two ballots stipulated to be opened remain sealed since they no longer affected the outcome of the election.***

On March 1, 1990, the Board adopted the hearing officer's findings and recommendations and certified the AFSCME as New Medico's employees exclusive bargaining representative. On March 19, 1990, New Medico refused to bargain with its employees. On March 22, 1990, AFSCME filed an unfair labor practice charge.

New Medico filed an answer contending that the hearing officer erred by sustaining the challenge to Griffin's ballot and by determining that New Medico was the legal successor to Greenbriar. The NLRB granted summary judgment against New Medico. The NLRB found that New Medico had litigated all of the representation issues that it now sought to raise in its answer. Consequently, the NLRB ordered New Medico to cease and desist in its refusal to bargain. This timely appeal followed.

II

The scope of our review of the Board's findings is limited to determining whether the findings are supported by substantial evidence on the record as a whole. *See* 29 U.S.C. § 160(e),(f); *Universal Camera Corp. v. NLRB,*

*** Since Griffin, as a supervisor, was prohibited from voting, the two ballots stipulated to be opened could no longer affect the election because at best, the results would be 43 for and 42 against.

340 U.S. 474, 488 (1951). "The Board's application of the law to the facts is also reviewed under the substantial evidence standard, and the Board's reasonable inferences may not be displaced on review even though the court might justifiably have reached a different conclusion had the matter been before it *de novo.*" *Turnbull Cone Baking Co. v. NLRB,* 778 F.2d 292, 295 (6th Cir. 1985), *citing NLRB v. United Ins. Co.,* 390 U.S. 254, 260 (1968). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Universal Camera,* 340 U.S. at 477. Where a Board's order has "no reasonable basis in law," such an order will not be enforced. *Ford Motor Co. v. NLRB,* 441 U.S. 488, 497 (1979).

III

The Board argues that its findings and conclusions were supported by substantial evidence on the record as a whole. New Medico argues that the Board's findings that New Medico was the legal successor to Greenbriar and that Susan Griffin was a supervisor were not supported by substantial evidence. We find the Board's finding and conclusions are supported by substantial evidence.

A.

New Medico argues that it is not a "successor" to Greenbriar and thus should not be bound by the NLRB's Certification of AFSCME. The Supreme Court in *NLRB v. Burns International Security Services, Inc.,* 406 U.S. 272 (1972), enunciated the test for determining whether or

not a new company is indeed the successor to the old. "This approach . . . Is primarily factual in nature and is based upon the totality of the circumstances of a given situation . . . " *Fall River Dyeing & Finishing Corp. v. NLRB,* 482 U.S. 27, 43 (1987). A successor business is bound by the predecessor's bargaining obligations if there is "substantial continuity" between the enterprises. *Id.* In determining whether "substantial continuity" exists, the NLRB examines whether: (1) there is continuity of the same business; (2) the new employer uses the same facility; (3) the new employer hires the same or substantially the same work force; (4) the same jobs exist under the same work conditions; (5) the same supervisors are employed; (6) the same equipment and machinery is used; and (7) the same product or service is conducted. *Id.*

There is substantial evidence in the record to support the NLRB's finding of "substantial continuity." New Medico operates a nursing care center as did Greenbriar. The health care operation was continued uninterrupted and in the same facility. Employee responsibilities remained the same, and virtually all of Greenbriar employees were hired except for the administrator, who rejected New Medico's offer. New Medico also informed Greenbriar employees that their years of service with Greenbriar would be used to establish their new salaries. Finally, testimony indicated that New Medico continued to care for the same patients without a substantial change in operation.

New Medico offers several reasons as to why the hearing officer erred in finding "substantial continuity," the most novel of which is New Medico's assertion that the successorship issue should have been determined as

of the date AFSCME was certified, March 1, 1990, and not the date on which New Medico took over the nursing home, March 1, 1989. New Medico contends that because the successorship issue is used to determine whether a new employer has a bargaining obligation with the union, there must be a certified union before it can be determined whether the employer has an obligation to bargain. Thus, because the union was not certified on March 1, 1989, the court erred in determining the successorship issue as of this date.

We have found no cases that address the situation at bar. We choose, however, to follow the thoughtful reasoning of the hearing officer in the present case. Clearly, the successorship issue would have been determined as of March 1, 1989, had the challenged votes not been determinative. We can think of no reason why the result should be different because it took more than a year to resolve the election. Any other position only encourages new owners to circumvent its obligations by filing challenges to certification. By the time these challenges are resolved, the bargaining unit may no longer represent "a substantial and representative complement" of employees. Consequently, we find that the NLRB did not err in finding that New Medico succeeded to Greenbriar's bargaining obligations on March 1, 1989.

New Medico next argues that the NLRB erred by granting summary judgment and thus not allowing New Medico to litigate the successorship issue before an administrative law judge. New Medico argues that this is error because the hearing officer found them guilty of unfair labor practices prior to AFSCME certification, and thus before any unfair labor practice could have been

committed. We find no merit to this claim. We have already held that the NLRB may determine the successorship issue before the resolution of challenges to a representation election. Likewise, it follows that the hearing officer may also determine prior to the resolution of challenges to a representation election that New Medico participated in unfair labor practices. Surely, a company's liability for these violations depends on whether the election yields Certification.

Finally, New Medico argues that it changed the employees working conditions and is, therefore, not a successor to Greenbriar. New Medico contends that it raised the employees' salaries and added significant benefits including a new bonus program. In *Briggs Plumbingware, Inc., v. NLRB*, 877 F.2d 1282 (6th Cir. 1989), the new employer argued that it was not a successor because it changed the "pay scale and policies concerning absence, vacations, jury duty, holiday pay and shift deferential [sic]." *Id.* at 1286. This Court rejected this claim, finding substantial continuity because the work force and operations remained the same. Similarly, in the present case, New Medico hired virtually all of Grenbriar's employees, and Grenbriar's testimony at the hearing revealed that there were no substantial changes in the operations. Thus, we find no merit to this argument.

B.

New Medico next argues that the NLRB's finding that Susan Griffin was a supervisor within the meaning of § 2(11) of the Act is not supported by substantial evidence on the record. New Medico contends that Griffin

was not a supervisor since she did not exercise independent judgment as personnel coordinator.

Section 2(11) of the Act, 29 U.S.C. § 152(11) defines a "supervisor" as:

> . . . [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such actions, if in connection with the foregoing the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment.

The indicia of supervisory authority are written in the disjunctive. Consequently, the possession of any one indicium enumerated in § 2(11) is sufficient to show an employee is a supervisor provided the individual has the authority to use independent judgment. *NLRB v. City Yellow Cab Co.*, 344 F.2d 575, 580-82 (6th Cir. 1965). It is also well settled that the exercise of routine or clerical authority does not elevate an individual to the status of supervisor. *NLRB v. Child-World, Inc.*, 817 F.2d 1251, 1254 (6th Cir. 1987). Similarly, an employee does not become a supervisor if his or her participation in personnel actions is limited to a reporting function and does not amount to an effective recommendation that retention, reward or discipline be given. *Beverly Enterprises v. NLRB*, 661 F.2d 1095, 100 [sic] (6th Cir. 1981). Further, because of the Board's expertise in resolving disputes concerning supervisory status, absent an abuse of discretion, its determination on this matter will not be disturbed. *Williamson*

Piggly Wiggly, Inc. v. NLRB, 827 F.2d 1098, 1100 (6th Cir. 1987).

There is substantial evidence in the record to support the hearing officer's conclusion that Susan Griffin exercised supervisory authority. The ability to hire is a primary indicia of supervisory authority. *NLRB v. Publishers Printing Co., Inc.*, 625 F.2d 746, 749 (6th Cir. 1980). Griffin testified that she interviewed and hired employees. But Griffin also testified that she was told to hire all applicants that "walked, talked, and breathed, not necessarily all at the same time . . . ," thus implying that she did not possess independent authority to hire. The hearing officer, however, found Griffin did have independent authority because one of Greenbriar [sic] employees testified that Griffin inquired as to his qualifications and motivations for working for Greenbriar.

Moreover, evidence also indicated that Griffin exercised independent authority to initiate disciplinary actions. Julie Borchard and Mark Cobb testified that they took Griffin to where a fellow employee was sleeping. She awoke the employee, who was subsequently discharged, and demanded that he return to work. Griffin then asked two nurses to write letters that detailed occasions in which they observed this employee sleeping. Griffin also gathered employee witnesses for the disciplinary hearing and asked questions as well as provided documents from the disciplined employee's file during the hearing.

Next, evidence was adduced to support the hearing officer's finding that Griffin acted as a supervisor in approving scheduling changes. Don Nidefski testified

that when he went to Griffin with requested schedule changes, she looked at the schedule and either approved or disapproved the requests. In each case, she gave an immediate response without checking with anyone. Moreover, Borchard and Cobb testified that Griffin approved their scheduling changes on the spot when they asked for time off to attend a birthday celebration.

We find that these duties resemble the exercise of authority that is contemplated by the statute. Additionally, we note that a Board may consider in its determination the employee conduct that creates the impression of supervisory authority. *See, e.g., Jeffrey Manufacturing Division v. NLRB*, 654 F.2d 944, 950 (4th Cir. 1991). Griffin often signed written warnings and termination letters as immediate supervisor and distributed them without the employees [sic] knowledge that she was not responsible for the letter. Similarly, Griffin was the lone signatory on several termination notices.

Accordingly, we find substantial evidence in the record to support the Board's finding that Susan Griffin is a supervisor under § 2(11) of the Act.

IV.

For the foregoing reasons, we **AFFIRM** the Board's determinations and **ENFORCE** the Board's order requiring New Medico to bargain with AFSCME as the exclusive bargaining representative of the appropriate unit of New Medico's employees.

APPENDIX B

NOT TO BE INCLUDED IN BOUND VOLUMES

SCD Howell, MI

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

GREENBRIAR CARE CENTER, INC.

and

NEW MEDICO HEALTH CARE CENTER OF MICHIGAN, INC.
Employer

and

Case 7-RC-18856

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held on February 17, 1989 and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 43 for and 40 against the Petitioner, with 5 challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's

findings[1] and recommendations, and finds that a certification of representative should be issued.[2]

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for American Federation of State, County and Municipal Employees, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit.

> All full-time and regular part-time nurses aides, physical therapy aides, laundry employees, activity employees, dietary aides, cooks, housekeeping employees, ward clerks and maintenance employees employed by Greenbriar at its

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[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 188 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

In adopting the hearing officer's findings that Griffin is a supervisor within the meaning of the Act, we find it unnecessary to rely on his findings regarding the discipline of Stanley Copeland.

[2] As the results of the election were 43 for and 40 against the Union, and since we have sustained the challenges to three of the five challenged ballots, the two ballots to which challenges have been overruled are no longer determinative. Accordingly, although the parties stipulated, for purposes of resolving the election only, that the challenges to the ballots case by Christine Schullar and Margie Kuhn be overruled and that their ballots be opened and counted, we adopt the hearing officer's recommendation that these ballots not be opened and counted.

facility located at 3003 W. Grand River Avenue, Howell, Michigan; but excluding all LPN's, RN's, technical employees, respiratory therapists, office clerical employees, casual employees, temporary employees, guards, and supervisor as defined in the Act.

Dated, Washington, D.C., March 1, 1990.

James M. Stephens, Chairman

Mary Miller Cracraft, Member

Dennis M. Devaney, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX C

299 NLRB No. 50

SCD
D-1397
Howell, MI

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW MEDICO HEALTH CARE
CENTER OF MICHIGAN, INC.

and

Case 7-CA-30357

AMERICAN FEDERATION OF
STATE COUNTY AND
MUNICIPAL EMPLOYEES,
AFL-CIO

DECISION AND ORDER

On April 12, 1990, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5)and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 7-RC-18856. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On June 4, 1990, the General Counsel filed motions with the Board to strike portions of the respondent's answer and for summary judgment. On June 6, 1990, the Union joined in the General Counsel's motions. On June

7, 1990, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motions should not be granted. Thereafter, on June 11 and 29, 1990, the Respondent filed a brief in opposition to the motions and a response to the Notice to Show Cause, respectively.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer to the complaint and opposition and response to the motions and Notice to Show Cause, the Respondent admits its refusal to bargain but attacks the validity of the certification on the grounds that the Board, in the representation proceeding, erroneously concluded that the Respondent was a legal successor and improperly sustained the Union's challenge to one of the determinative ballots.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceedings. The Respondent does not offer to adduce at a hearing any newly discovered and previously

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[1] In its response to the Notice to Show Cause the Respondent intimates that it was denied due process by the Board's failure to await and consider its June 11, 1990 opposition to the motions before transferring the proceedings to the Board. However, as we have fully considered both the Respondent's opposition to the motions and its response to the Notice to Show Cause before actually ruling on the General Counsel's motions, we find that the Respondent has not suffered any prejudice thereby.

unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceedings. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[2]

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

The Respondent, a Delaware corporation with an office and place of business at 3003 W. Grand River Avenue, Howell, Michigan, is engaged in the business of providing skilled long-term patient care and rehabilitation for traumatic brain injuries. During the year ending February 28, 1990, the Respondent derived gross revenues from all sources in excess of $100,000 and purchased supplies valued in excess of $5000 for its Howell, Michigan facility directly from outside the State of Michigan. We find that the Respondent is an employer within the meaning of Section 2(6) and (7) of the Act and that the

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[2] Given our disposition of the General Counsel's Motion for Summary Judgment, and our further findings, infra at fn. 3, we find it unnecessary to pass on the General Counsel's motion to strike portions of the Respondent's answer.

Union is a labor organization within the meaning of Section 2(5) of the Act.[3]

II. Alleged Unfair Labor Practices

A. The Certification

Following the election held February 17, 1989, the Union was certified on March 1, 1990, as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time nurses aides, physical therapy aides, laundry employees, activity employees, dietary aides, cooks, housekeeping employees, ward clerks and maintenance employees employed by New Medico Health Care Center of Michigan, Inc., at its facility located at 3003 W. Grand River Avenue, Howell, Michigan; but excluding all LPNs, RNs, technical employees, respiratory therapists, office clerical employees, casual employees, temporary employees, guards, and supervisors as defined in the Act.[4]

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[3] In its answer to the complaint, the Respondent avers that it is "without sufficient information to form a belief" as to whether the union is a labor organization within the meaning of Sec. 2(5) of the Act. The Respondent failed to raise this issue in the underlying representation proceeding, however, and is therefore precluded from litigating it here. See discussion, supra.

[4] Due to an inadvertent error, on March 26, 1990, the Board issued an Order Correcting the March 1, 1990 Decision and Certification of Representative. The unit appears as corrected in the March 26, 1990 Order.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since March 7, 1990, the Union has requested the Respondent to bargain and, since March 19, 1990, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

By refusing on and after March 19, 1990, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2 (6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac*

Poultry Co., 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, New Medico Health Care Center of Michigan, Inc., Howell, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with American Federation of State, County and Municipal Employees, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time nurses aides, physical therapy aides, laundry employees, activity employees, dietary aides, cooks, housekeeping employees, ward clerks and maintenance employees employed by New Medico

> Health Care Center of Michigan, Inc., at its facility located at 3003 W. Grand River Avenue, Howell, Michigan; but excluding all LPNs, RNs, technical employees, respiratory therapists, office clerical employees, casual employees, temporary employees, guards, and supervisors as defined in the Act.

(b) Post at its facility in Howell, Michigan, copies of the attached notice marked "Apendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the regional Director in writing within 20 days from the date of this Order what steps the respondent has taken to comply.

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[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. August 9, 1990

James M. Stephens, Chairman

Mary Miller Cracraft, Member

Dennis M. Devaney, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with American Federation of State, County and Municipal Employees, AFL-CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and

conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time nurses aides, physical therapy aides, laundry employees, activity employees, dietary aides, cooks, housekeeping employees, ward clerks and maintenance employees employed by New Medico Health Care Center of Michigan, Inc., at its facility located at 3003 W. Grand River Avenue, Howell, Michigan; but excluding all LPNs, RNs, technical employees, respiratory therapists, office clerical employees, casual employees, temporary employees, guards, and supervisors as defined in the Act.

NEW MEDICO HEALTH CARE
CENTER OF MICHIGAN, INC.

_____
(Employer)

Dated_____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226-2568, Telephone 313-226-3219.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

GREENBRIAR CARE CENTER, INC.[1]

and

NEW MEDICO HEALTH CARE CENTER OF MICHIGAN, INC.[2] CASE NO. 7-RC-18856

Employer

and

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

Petitioner

HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON CHALLENGED BALLOTS AND SUCCESSORSHIP

Upon a petition filed on December 15, 1988, by American Federation of State, County and Municipal Employees, AFL-CIO, herein called Petitioner, and pursuant to a Stipulated Election Agreement executed by Petitioner and Greenbriar and approved by the Regional

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[1] Except for providing a representative for purposes of resolving challenged ballots, Greenbriar Care Center, Inc., herein called Greenbriar, did not participate in the hearing. It was served with a copy of the Report and Notice of Hearing.

[2] The name of this Employer, herein called New Medico, appears as corrected at the hearing.

Director for the Seventh Region of the National Labor Relations Board on January 6, 1989,[3] an election by secret ballot was conducted on February 17,[4] among the employees of Greenbriar in the following appropriate collective bargaining unit:

> All full-time and regular part-time nurses aides, physical therapy aides, laundry employees, activity employees, dietary aides, cooks, housekeeping employees, ward clerks and maintenance employees employed by Greenbriar at its facility located at 3003 W. Grand River Avenue, Howell, Michigan; but excluding all LPN's, RN's, technical employees, respiratory therapists, office clerical employees, casual employees, temporary employees, guards, and supervisors as defined in the Act.

The payroll period for eligibility purposes was the bi-weekly period ending Friday, December 30, 1988.

At the conclusion of the election, a copy of the Tally of Ballots, showing the following results, was made available to, and served upon, Petitioner and Greenbriar, in accordance with the current Rules and Regulations of the Board:

Approximate number of eligible voters	106
Void Ballots	0
Votes cast for Petitioner	41

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[3] Hereinafter, all dates are 1989 unless otherwise noted.

[4] The date of election was incorrectly set forth in the Report and Notice of Hearing as February 12.

Votes Cast against participating labor organization	37
Valid Votes counted	78
Challenged ballots	10
Valid Votes counted plus challenged ballots	88

The challenged ballots were sufficient in number to affect the results of the election and were received and segregated in a manner adequate to ensure their secrecy. Inasmuch as the challenged ballots affect the ultimate results of the election, a preliminary investigation was conducted with respect thereto under the direction and supervision of the Regional Director. This preliminary investigation established the existence of substantial and material factual issues, including credibility resolutions, which could best be resolved at hearing. Accordingly, on March 20, the Regional Director issued a Report and Notice of Hearing on Determinative Challenged Ballots and Approval of Withdrawal of Objections.[5]

Prior to hearing, the parties entered into a Stipulation Resolving Challenged Ballots whereby they agreed that the challenges to the ballots of *Sally Giese, Ann Herrington, Shannon Melow, Donna Priest* and *Jesse Shearer* would be overruled and that their ballots would be opened and counted.[6] A Corrected Tally of Ballots, reflecting the count of the five resolved challenged ballots, showing the

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[5] All of the objections were withdrawn.

[6] The parties entered into the Stipulation "for purposes of resolving this election only, and without prejudice to any position any party may take in any other proceeding."

following results, was made available to each of the parties in accordance with the current rules and regulations of the Board:

	ORIGINAL TALLY	CHALLENGED COUNTED	FINAL TALLY
Approximate number of eligible voters ...	106		
Void ballots	0		
Votes cast for Petitioner	41	2	43
Votes cast against participating labor organization	37	3	40
Valid votes counted	78		83
Undetermined challenged ballots	10		5
Valid votes counted plus challenged ballots	88		88

The remaining challenged ballots were sufficient in number to affect the final results of the election. They were received and segregated in a manner adequate to protect their secrecy.

In addition to the challenged ballots, the undersigned was directed by the Report and Notice of Hearing to take

testimony on the issues of whether or not New Medico is a successor to Greenbriar and whether or not New Medico has any obligations arising out of the instant representation proceeding.

Pursuant to the aforementioned Notice of Hearing, a hearing was held before the undersigned Hearing Officer on March 30 and 31, and April 3. The hearing was conducted in accordance with the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended. All parties were represented and were afforded full opportunity to be heard, to present and examine witnesses, to introduce relevant evidence and to present oral arguments during the course of the hearing.

Upon the entire record in this case, I make the following findings of fact, conclusions of law and recommendations:

I. BACKGROUND

New Medico is a Delaware corporation engaged in the operation of a nursing center in Howell, Michigan. The parties stipulated at the hearing, and I find, that based upon a projection of its operations from March 1 when it commended business, until March 30, New Medico is engaged in commerce within the meaning of the Act.

New Medico is wholly owned by Charles Braddick and is affiliated with New Medico Associates, herein called NMA, a health care company which specializes in the treatment and rehabilitation of individuals who have suffered traumatic brain injuries. NMA and its affiliates

operate 47 facilities in 15 states and employ approximately 7000 employees. Ninety percent of the stock of NMA is owned by Charles Braddick. The remaining 10% is owned by relatives and friends of Braddick. Employer New Medico operates only the Howell facility involved in this proceeding and has retained NMA to manage that facility. NMA owns and/or operates three other facilities within the State of Michigan.

II. SUCCESSORSHIP ISSUE

Petitioner contends that New Medico is a successor to Greenbriar, and, accordingly, is obligated by any Certification of Representative which may issue in this case. In support of this contention, Petitioner asserts that when New Medico commenced operations, a majority of its employees and supervisors were former employees and supervisors of Greenbriar; it serviced the same patients, and it utilized the same facility.

New Medico argues that it is not a successor to Greenbriar and proffers several reasons why it should not be bound by any certification which may issue as a result of the instant proceeding. First, it asserts that it had no knowledge of any NLRB proceeding when it agreed to take over operation of the Howell facility. Second, on March 1, when it commenced operations, there was no collective bargaining agreement or recognized union in place, nor had any certification issued. Third, it purchased nothing from Greenbriar other than some disposable nursing supplies. Fourth, it plans to make substantial changes in the operation of the facility, and

fifth, the change of ownership will affect the attitude of employees toward representation.

FACTS

NMA President Jeffrey Goldshine testified that at or about the end of January, he received a telephone call from Mark Finkelstein of Health and Rehabilitation Properties Trust (HRPT), a real estate investment trust, asking if NMA would be interested in becoming the tenant of the Greenbriar facility in Howell, Michigan, a property owned by HRPT. It appears that the property was available because the incumbent tenant, Greenbriar, had fallen behind in its lease payments. Because of its location, Goldshine expressed an interest and requested that pictures, financial statements and occupancy information be provided. Discussions continued and on February 17, NMA agreed to lease the property. Thereafter, on February 22, a management team from NMA visited the Howell facility. During this visit, officials of NMA learned of the election in the instant matter, and of a 21-page deficiency report from the State. Goldshine, who was on vacation the week of February 19, learned of the election on February 27, when he returned to his office. He instructed Human Resources Director Phil Marsh to contact the company's labor attorneys and general counsel to examine all available options. Goldshine testified that the attorneys advised:

> . . . everyone had already previously agreed and that I believe that if you absolutely insist, it would be, we would have to go through a process on it but based upon the information that we had the relationship that we've had in the

past, with them leasing us facilities and lending us money, we chose to proceed.[7]

According to Goldshine, NMA's negotiations to take over operation of the Greenbriar facility were with HRPT, not with Greenbriar. The only discussions between NMA and Greenbriar occurred at the time of closing and only involved the purchase of disposable nursing supplies located on the site – catheters, powder, bandages and non-prescription house drugs. These supplies were purchased, but Goldshine did not know the price paid.

At the March 1 closing, New Medico signed a three year lease calling for rental payments of $40,000 per month and commenced operation of the Howell facility under a Certificate of Licensure from the Michigan Department of Public Health to operate a nursing home.[8] Based at least in part on the nature of the industry and the need to provide continuous care for patients, there was no hiatus in operations. At the time of the transfer, New Medico assumed responsibility for the patients. Since the transfer, a few patients who could not be properly cared for at the facility were moved to hospitals.

The parties stipulated, and I find, that virtually all of Greenbriar's employees and virtually all of its supervisors on February 28 were employed by New Medico on March 1.[9] Employee Barbara Butler testified concerning

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[7] Transcript, page 56.

[8] The certificate was for the period March 1 to May 31.

[9] The one known exception was Administrator Lance Youle who was apparently offered a position, but declined.

her hiring by New Medico. On February 27, she received a letter[10] advising that New Medico was in the process of purchasing the Howell facility and was "willing to offer all current hourly employees of Greenbriar the opportunity to apply for employment." The letter outlined wage rates and benefits. Benefits were similar, but wage rates were higher. Butler went from $5.11 per hour under Greenbriar to $5.43 per hour under New Medico. In addition, under New Medico, she received a $.25 per hour premium for midnight shift and a $.50 per hour premium for working in a special care unit.[11] As an inducement to Greenbriar employees to apply for jobs at New Medico, the letter stated that each employee's years of service with Greenbriar would be taken into consideration in establishing that employee's wage rate. The letter further stated that for purposes of calculating benefits, former Greenbriar employees would be given credit for their seniority with Greenbriar as if they had been employed by New Medico. Butler additionally testified that the functions and services of the facility have not changed since the takeover. She added that Greenbriar treated closed head injury patients and these patients remain in the facility.

Goldshine testified that the building will undergo a complete renovation and new equipment will be added in order to provide treatment capabilities for patients with traumatic brain injuries. Based on projections, he estimated that the number of beds will be reduced from

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[10] Petitioner Exhibit 2

[11] According to NMA Director of Personnel Frank Parr, aides received increases of from $.75 to $2.00 per hour.

around 180 to 160 to allow space for rehabilitation programs, and that eventually approximately 40 beds, or one-quarter of the total, will be designated for traumatic brain injury patients. The total workforce is expected to increase from 180 employees on March 1 to 400. It was anticipated that 30 additional employees would be hired within 90 days of the hearing; 50 more three months after that; another 50 in the following six months, and the remainder six months after that.[12]

Occupational therapists, speech pathologists, vocational counselors, social workers, psychologists and special educators and additional physical therapists and respiratory therapists will be added. The addition of the rehabilitation departments will result in substantial increases in unit employees. According to Goldshine, aides will be added in the following areas: dietary (10), housekeeping (5 or 6), activities (4 or 5), transportation (3), physical therapy (6), occupational therapy (4), special education (2), mental health (5 or 6), and recreational therapy (4). He estimated that the number of nursing assistants would double. It appears that the transportation aides, occupational therapy aides, special education aides and mental health aides will be newly created

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[12] It is unclear from the record precisely what the increase in the number of unit employees will be. Joint Exhibit 2 lists approximately 130 unit employees employed on March 9 who were previously employed by Greenbriar and four who were not. Based upon Goldshine's testimony and Joint Exhibit 2, I find that the number of unit employees will approximately double during the two-year period in which the total work force will double.

classifications.[13] As of the date of the hearing, however, no new traumatic brain injury patients had been admitted. According to Goldshine, New Medico has to eliminate the 21 pages of deficiencies before it can begin admitting such patients. No time frame was proffered.

Goldshine testified that Greenbriar and New Medico do not share any common officers, and that there is no common ownership between the two companies. Similarly, New Medico and HRPT do not share any common officers or owners. The parties stipulated that the takeover of the Howell facility by New Medico was an arm's length transaction. Petitioner does not allege, and no evidence was presented to support, a finding that an alter-ego or a disguised continuance arrangement exists between New Medico and Greenbriar.

ANALYSIS[14]

Analysis in successorship cases begins with the Supreme Court's decision in *NLRB v Burns International Security Services, Inc.*, 406 U.S. 272 (1972) wherein the Court endorsed the Board's "substantial continuity of the

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[13] It appears from the record that the recreation aide position existed under Greenbriar but is not one of the nine classifications listed in the unit description. Also, it appears that the nurse aide classification listed in the unit description includes both special care aides and geriatric aides. It is unclear from the record how closely the duties of the occupational therapy aides, special education aides or mental health aides will resemble those of the special care aides.

[14] The testimony of Goldshine and Butler as recounted above was essentially uncontradicted. I credit both witnesses.

employing enterprise" test and held that where "the bargaining unit remained unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent" (at 281) the successor employer has an obligation to bargain with the incumbent union. In cases following *Burns*, the Board continued to apply and develop the "substantial continuity" test. Factors considered include: (1) continuity in the same business; (2) use of the same plant; (3) use of the same or substantially the same workforce; (4) existence of the same jobs under the same working conditions; (5) retention of the same supervisors; (6) use of the same machinery, equipment and methods of production; and (7) manufacturing the same product or offering the same service.[15] The analysis is based upon a totality of circumstances and is primarily factual in nature.

Based upon the evidence presented, I find that a substantial continuity of employing enterprise exists. New Medico operates a nursing care center as did its predecessor, Greenbriar. It commenced operation without hiatus in the same facility, utilizing a virtually identical workforce, holding the same or similar jobs, under the same or similar working conditions, working under the same supervisors and with the same non-unit employees, caring for the same patients, with at least some of the same equipment. Unit employees worked one day for Greenbriar, the next for New Medico. Job applications and W-4 forms for New Medico were not filled out until

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[15] *Faria Limited d/b/a/Sheffield Industries*, 287 NLRB No. 136 (1988), JD slip op. at 10; *Aircraft Magnesium, a Division of Grico Corporation*, 265 NLRB 1344, 1345 (1982).

several days after the takeover. Time worked for Greenbriar was credited as time worked for New Medico for certain wage and benefit purposes. It is difficult to imagine a greater degree of continuity. According, I find that New Medico is a successor under *Burns. Fall River Dyeing & Finishing Corporation v. NLRB*, ___ U.S. ___, 125 LRRM 2441 (187); *P & M Cedar Products, Inc.*, 284 NLRB No. 76 (June 30, 1987).

The analysis continues with a determination of when a "substantial and representative complement" of employees will be working in the bargaining unit. Where, as here, an employer takes over, without hiatus, an enterprise in full production, it is usually found to have a representative complement of employees when it commences operations, even if it has plans for expansion.[16] *Premium Foods, Inc. v. NLRB*, 704 F.2d 623, 629 (CA 9, 1983), enfg. 260 NLRB 708 (1982); *NLRB v. Hudson River Aggregates, Inc.*, 639 F.2d 865, 870 (CA 2, 1981) enfg. 246 NLRB 192. The evidence presented in the instant matter does not dictate a different result. On March 1, New Medico employed the same employees, both as to number

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[16] Under circumstances where the successor does not assume an enterprise in full production, the Board, with Supreme Court approval, considers the following factors in determining when a substantial and representative complement exists: (1) job classifications filled or substantially filled; (2) operation in normal or substantially normal production; (3) size of employee complement on date of normal production; (4) time before a substantially larger complement will be employed; and (5) certainty of successor's expansion plans. *Fall River v. NLRB, supra.* Under this test I would find a substantial and representative complement existed on March 1. I will discuss New Medico's expansion plans *infra.*

and identity, working in the same or substantially the same classifications, as had been the case a day earlier when they were employed by Greenbriar. Accordingly, I find that New Medico had a substantial and representative complement of bargaining unit employees on March 1. Further where, as here, a successor manifests an intent to hire a majority of its predecessor's workforce, a substantial and representative complement may be found on the date the successor commences operations. *Memphis Truck & Trailer, Inc.*, 284 NLRB No. 99, JD slip op. at 14 (July 10, 1987).

I turn now to a discussion of each of New Medico's proffered reasons as to why it should not be deemed a successor with an obligation to bargain with Petitioner, should Petitioner receive a majority of votes cast in the election.

A. Lack of Knowledge

Despite assertions to the contrary, I find, based upon the testimony of Jeffrey Goldshine, that New Medico did have knowledge of the representation proceeding prior to the lease closing. After it learned of the election on or about February 22, New Medico could have "gone through a process" to cancel the agreement with HRPT, but because of the company's past relationship with HRPT, it elected not to.[17] *Beck Corporation*, 279 NLRB 405, 407 (1986).

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[17] As further evidence of knowledge of the election and its significance, I note that the February 27 letter from New

(Continued on following page)

B. Assets of Predecessor Not Purchased

The fact that New Medico leased the facility from HRPT instead of Greenbriar, and purchased only disposable nursing supplies from Greenbriar, is not dispositive. Indeed, there is no evidence in *Burns* that Burns purchased any assets from its predecessor, Wackenhut Corp. See, *Memphis Truck, supra,* JD slip. op. at 12. *Premium Foods v NLRB, supra.*

C. Substantial Changes

Virtually every successor intends to make some changes in the business it purchases or takes over. The real question is whether these changes are so substantial so as to change the nature of the enterprise. New Medico intends to upgrade the quality of care offered to patients. More importantly, New Medico intends to create a traumatic head injury rehabilitation unit comprising one-quarter of the total available beds. The addition of the head injury unit will result in the hiring of additional professional and technical employees who will be outside the unit, and the creation of four or five new unit positions. Over a two year period, as a result of the upgrading of the facility and establishment of the rehabilitation

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(Continued from previous page)

Medico to Greenbriar employees (Petitioner Exhibit 2) makes reference to the election, states that New Medico would prefer not to deal with a union, but adds that if a labor organization is certified in an appropriate unit, New Medico will bargain in good faith with that labor organization.

unit, the number of unit employees will approximately double.

Still, 75% of the beds will be occupied by geriatric patients. And, although to a lesser extent and without the benefit of a full rehabilitation program, Greenbriar admitted and cared for head injury patients. I find that the changes involved herein, both implemented and projected, are less substantial than changes in other cases where the Board and/or Courts have found both successorship and a bargaining obligation. *NLRB v Aquabrom*, 855 F.2d 1174 (CA 6, 1988), 129 LRRM 2138, 2142; *Fall River v NLRB, supra*, p. 2444; *IMS Manufacturing Company, Inc. v NLRB*, 813 F.2d 113 (CA 6, 1987); *Dasal Caring Centers, Inc. d/b/a Lemay Caring Centers, Inc.*, 280 NLRB 60, 71-73 (1986); *Premium Foods v NLRB, supra; NLRB v Jeffries Lithograph Company*, 752 F.2d 459 (CA 9, 1985) enfg. 265 NLRB 1499. Compare *Plateau Coal Sales, Inc.*, 279 NLRB 1151, 1159-60 (1986); *Morton Development Corporation*, 287 NLRB No. 41 (December 16, 1987); *Daka, Inc.*, 286 NLRB No. 49 (September 30, 1987).[18] I find that the changes are not so substantial so as to change the nature of the enterprise or negate the bargaining obligation.

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[18] Further, no time table was given for when the head injury unit would be in operation as this is dependent on when the 21 pages of deficiencies are eliminated. The projection for the completion of the expansion and renovation of the facility and the hiring of a full complement of employees is two years. This is too long a period for employees to wait for representation. *Premium Foods v NLRB, supra; Fall River v NLRB, supra.*

D. Employee Attitudes Toward Representation

The primary focus in assessing employee attitude toward representation in successor cases centers on the changes implemented by the successor and whether the changes are of such magnitude so as to affect how employees feel about representation. *Premium Foods, supra; NLRB v Jeffries Lithograph, supra; Ranch Way, Inc.*, 183 NLRB 1168, 1169 (1970); *Albert Armato and Wire & Sheet Metal Specialty Co.*, 199 F.2d 800, 803 (CA 7, 1952) enfg 97 NLRB 971 (1952).

Essentially, the same factors are considered as are used in evaluating the continuity of the employing enterprise and substantial change. I have previously found that the same unit employees were performing essentially the same work, at the same facility, under essentially the same supervisors, utilizing some of the same equipment. Accordingly, I find that the changes resulting from the transition from Greenbriar to New Medico are not so substantial as to affect employee attitudes toward representation. Compare *Morton Development, supra.*

E. No Collective Bargaining Agreement, Recognized Union or Certified Representative

The fact that Greenbriar and Petitioner never negotiated a contract is not determinative. *Beck, supra; NLRB v Jarm Enterprises, Inc.*, 785 F.2d 195 (CA 7, 1986) enfg 270 NLRB 199.

The fact that Petitioner has never been recognized or certified is the novel aspect of this case. Clearly, had the

challenged ballots not been determinative, and had Petitioner received a majority of the ballots cast, New Medico, as a successor, would have been obligated on March 1 to bargain with Petitioner. It would, it seems to me, go contrary to the purposes and policies of the Act, to find that because of determinative challenges no obligation exists if Petitioner receives a majority of the votes.

Based upon the above, I find that New Medico is a successor to Greenbriar; that New Medico employed a substantial and representative complement of employees on March 1, and that if Petitioner receives a majority of votes cast, it should be certified as collective bargaining representative of New Medico's employees in the unit described herein, substituting New Medico's name for Greenbriar's. Under these circumstances, New Medico would be obligated to bargain with Petitioner.

III. THE CHALLENGED BALLOTS

Petitioner challenged the ballots of *Susan Griffin, Joan Kehres, Margie Kuhn, Barbara McCreary* and *Christine Schullar* based upon its belief that each is a supervisor within the meaning of Section 2(11) of the Act. New Medico asserted at the hearing that each of the above-named individuals was employed as a bargaining unit employee on the date of the election.

A. THE BALLOTS OF CHRISTINE SCHULLAR, MARGIE KUHN, JOAN KEHRES AND BARBARA McCREARY

After the hearing opened, but before the record was closed, the parties entered into a stipulation resolving four of the remaining challenged ballots.

The parties stipulated, for purposes of resolving the election only, and without prejudice to any position any party might take in any other proceeding, that the challenges to the ballots cast by Christine Schullar and Margie Kuhn be overruled and that their ballots be opened and counted on the grounds that each was employed in the petitioned-for unit and neither possessed sufficient authority to be deemed a supervisor within the meaning of Section 2(11) of the Act.

The parties further stipulated, for purposes of resolving the election only, and without prejudice to any position any party might take in any other proceeding, that the challenges to the ballots cast by Joan Kehres and Barbara McCreary be sustained, and that their ballots not be counted, on the basis that each possessed sufficient authority to be deemed a supervisor within the meaning of Section 2(11) of the Act.

In accordance with the stipulations of the parties, I recommend that the challenges to the ballots of Christine Schullar and Margie Kuhn be overruled and that their ballots be opened and counted. I further recommend that the challenges to the ballots of Joan Kehres and Barbara McCreary be sustained and that their ballots not be counted.

B. THE BALLOT OF SUSAN GRIFFIN

Petitioner challenged the ballot of Susan Griffin based upon its belief that she is a supervisor within the meaning of Section 2(11) of the Act. New Medico contends that she is not a supervisor.

Certain background information on Susan Griffin was not disputed. She was hired initially by Greenbriar in December 1986, during a three-month school break to work as a receptionist from 4:00 p.m. to 8:00 p.m. and as an aide from 8:00 p.m. to 7:00 a.m. From January 25, 1988, until September 12, 1988, she worked for Greenbriar as its business office manager. She had a break in service between September 12 and September 19, 1988. On September 19, 1988, she returned to work as personnel coordinator, a position she held until March 1, 1989. As personnel coordinator, she shared an office with Irene Karas[19], an assistant director of nursing, who was in charge of certain personnel functions. She was hired by Karas at a starting rate of $6.00 per hour and received a $.50 per hour increase after 90 days. her basic duties as personnel coordinator were to maintain personnel files, schedule geriatric nurse aides, keep track of absenteeism, personnel days and vacation hours, and perform general clerical duties. Since March, Griffin has been employed by New Medico as its personnel director. It is her duties and responsibilities as personnel coordinator with Greenbriar which are at issue in this proceeding.

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[19] Ms. Karas' last name is actually Karaskiewicz, but at work, in the record, and in this report she is referred to as "Karas."

TESTIMONY

Petitioner called a number of witnesses,[20] including Griffin, to support its position that Griffin was a supervisor.

Matthew Schultz

Schultz, a nursing assistant in the special care unit, testified concerning his hiring by Greenbriar. After learning from an employee that there were openings at Greenbriar, Schultz went to the facility in November 1988. He was given an employment application by the receptionist. The receptionist contacted Griffin and may have instructed Schultz to fill out the application while he was waiting. After Griffin arrived, she and Schultz went to the B wing lounge where an interview was conducted. Griffin asked Schultz about his experience in the field, inquired as to why he wanted to work at Greenbriar and why he thought it would be good for the company to hire him. Because of his experience, Griffin invited Schultz to take an exam to waive the orientation period. Schultz began taking the test in the personnel office, but later moved to another room. Griffin advised Schultz that he passed the test with flying colors and asked when he would like to begin work. Schultz stated he wanted to start the next day. He was then given some paperwork to fill out, including a W-4 form. During this time, Schultz

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[20] In addition to the employee witnesses whose testimony is recounted below, Petitioner also called special care aide Mark Grieve. His testimony was brief and is not helpful in resolving the supervisory issue.

advised Griffin that he would not be in town the last week in December. Griffin replied that this would not be a problem. Schultz began working for Greenbriar the following day.

Griffin did not stay with Schultz the entire time he filled out the application or took the test. According to Schultz, however, he was not interviewed by anyone other than Griffin before being advised he was hired, and Griffin did not consult with anyone before advising him he could be off the last week in December. Karas was in the personnel office when he began to take the test. She introduced herself to him, but did not give her title. Karas did not ask him any questions, but did ask Griffin if she had given him policy information, including information on vacations; she had. Karas stated she did not appreciate people not showing up for work.

Schultz further testified that when the schedule was posted for the end of December, he was scheduled to work. Acting on the advice of charge nurse Donna Palmer, he wrote a note to Griffin stating he would not be able to work the last week in December. He did not hear back from Griffin, but he took the time off and was not disciplined.

Donald and Mary Sue Nidefski

The Nidefskis testified concerning "Disciplinary Actions" they received from Griffin on September 26, 1988, for absenteeism.[21] The actions were signed by

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[21] Petitioner Exhibits 4 and 5.

Griffin as "Immediate Supervisor" and by Irene Karas as "Reviewing Supervisor/Administrator." The action was a "First Violation – written warning." Three absences in the month of September were listed.

According to Donald Nidefski, Griffin came up to his wife and him and stated, "I want to give you guys these write-ups." Griffin signed the write-up in front of them and asked them to sign. The discipline itself was not discussed. Griffin stated she had several more write-ups to pass out. She also stated, "I do not want to have to give these to you, but it's part of my job and I have to enforce policies."[22]

According to Mary Nidefski, when Griffin brought the write-ups to her husband and her she stated, "I've got something for you and Don. I don't really want to do it, but I have to." As Mary was signing the warning, she stated that the warning was not fair, that she had made up the days that she had missed, that on two of the days, she and Don had the flu. Griffin instructed her to write this on the lines provided for employee comments.

Don Nidefski additionally testified that three or four days later he approached Griffin and advised her that one of the days he was charged with missing was a scheduled day off and he wanted to talk to her about the matter. Griffin replied that she would have to check the book, but she never got back to him. He stated that he went to Griffin because he understood the discipline to be issued in her name. Each of the Nidefski's had been issued prior

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[22] Transcript, p. 345.

discipline, but the September 26 "Disciplinary Actions" were the only discipline they received from Griffin.

Donald Nidefski also testified about Griffin's role in scheduling and in authorizing overtime. He stated that if an employee wanted to switch a day he is scheduled to work, he either called or visited Griffin and made a request. On those occasions when he talked to her directly, Griffin looked at the schedule and immediately either approved or disapproved the request without consulting with anyone. Concerning overtime, Nidefski stated that the charge nurse could authorize overtime, but that he often made his request through Griffin. He went to the nursing station at the end of his shift and advised the nurse he wanted to work overtime. Griffin either called the facility from home, or the nurse called Griffin. After talking to Griffin, the nurse stated, "Susan said it was okay, it's fine." On occasion, Nidefski contacted Griffin directly about working overtime. She checked the schedule and gave him an immediate answer without consulting with anyone. In addition, there was a notation on the employee phone list kept at the nursing stations, in what Nidefski identified as Griffin's handwriting, stating "If have staffing problems please call Susan Griffin" and then listed her home telephone number.[23]

Julie Borchard and Mark Cobb

Aides Borchard and Cobb were called to the stand to testify about Griffin's involvement in the termination of pool aide Stanley Copeland. One night during midnight

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[23] Petitioner Exhibit 10.

shift, Borchard and Cobb went to Griffin's office and asked Griffin to accompany them, stating that they wanted to show her something. They took Griffin to D-wing lounge where Copeland was sleeping. Griffin stated to Copeland, "Get up and go back to work."[24] The two employees then followed Griffin to the nursing stating. Griffin advised charge nurses Dawn Prather and Georgia Kennedy of the incident and asked them if this happened a lot. The nurses responded that they had observed Copeland sleeping. Griffin asked the nurses to write a letter concerning Copeland sleeping.

A few days later, Griffin asked Borchard and Cobb to attend a meeting on the Copeland situation. The meeting was chaired by Administrator Lance Youle. Copeland and employee Kathy Waters also attended the meeting. Griffin sat on one side of Youle, Copeland on the other. Youle did most of the questioning. Griffin spoke at the meeting, but Borchard could not remember what Griffin said. According to Cobb, Griffin asked, "Are you telling me that you weren't sleeping?" Griffin had Copeland's personnel file with her, and provided Youle with documents from the file. At the conclusion of the meeting, Youle advised Copeland he would call him Monday and let him know if he was dismissed.

No supervisor or official of Greenbriar ever advised either Borchard or Cobb that Griffin was a supervisor. Borchard testified that Prather is her charge nurse and direct supervisor. She went to get Griffin to show her that Copeland was sleeping "because she is the supervisor for

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[24] Transcript, p. 376.

the floor" and she wanted to show Griffin what went on during midnights. She stated she considered Griffin to be a supervisor because she made out the schedule, employees write notes to her for vacations and employees go to her for time off. Cobb testified that he went to get Griffin because he had gone to the nurse previously, and she just awakened Copeland. Griffin happened to be at the facility and he thought that she was a higher authority because she was the one employees went to for problems, such as scheduling.

Borchard and Cobb additionally testified that five minutes after they left the conference room for the Copeland hearing, they heard an announcement on the public address system that there was going to be a supervisor's meeting in the conference room. They went back downstairs to the conference room. Apparently, the meeting had not yet started. They asked Griffin to come out and talk to them. She did. They asked Griffin if they could have Sunday off because they were going to a birthday party for Borchard's grandmother. Griffin gave them immediate permission to take the day off.[25] Borchard stated that she asked Griffin for the day off instead of the charge nurse because Griffin is in charge of doing the schedule.

Cobb additionally testified that he talked to Griffin about problems with his checks and showed her where his hours had been miscalculated. She advised him he could pick up his check the next Monday or Tuesday. He

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[25] Cobb testified that Griffin asked that they write her a note on the requested day off so that she would not forget.

acknowledged that he had also talked to office manager Pat Rogan about pay problems.

Barbara Butler

Butler, a non-geriatric nurse aide, testified that she is scheduled by her nurse and not by Griffin. Butler's requests for leave time, vacation pay and vacation time are made to Griffin or Karas. Such requests are generally done via written form, but Butler has made them in person or by telephone. She received vacation days in December and vacation pay by verbal requests to Griffin. Additionally, she brought payroll problems to Griffin's attention and asked her to re-check figures. Director of Nursing Noreen Acheson and Greg Adare, (a corporate employee) also were involved in the payroll problems. Butler stated she considered Griffin to be a supervisor because of "general posture knowledge" – she is the person you called if there were shortages on the floor with personnel.[26]

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[26] Butler also testified with respect to a telephone conversation she had with charge nurse Louise Loren. Butler asked Loren if she did not accept the idea that Griffin could hire, write-up or discipline in the same manner that she (Loren) could. Loren replied, "Yes, I guess that's true." Butler stated that no specific time frame was given for the question or the response, i.e., whether the response concerned Griffin's duties and responsibilities as personnel director with New Medico, or as personnel coordinator with Greenbriar. Butler and Loren were discussing the challenged ballots when Butler asked the question.

Susan Griffin[27]

Griffin testified at length concerning her job duties as personnel coordinator. As stated above, her basic duties were to maintain personnel files, schedule geriatric nurse aides, keep track of absenteeism, personal days and vacation hours, and perform clerical tasks. A summarized account of her testimony follows.

While Griffin was personnel coordinator, the schedule was prepared on a bi-weekly basis. Each full-time geriatric aide was scheduled to work 10 days during the two-week period, no more than four days consecutively. Each aide was required to work every other weekend. The new schedule picked up where the prior schedule left off. Once the schedule was completed, Griffin presented it to Karas for approval before it was posted. Griffin, however, could not recall Karas making changes on the schedules she prepared. Requests for schedule changes were submitted to Griffin, but all requests had to be approved by Karas. Griffin advised Karas of any problems related to the request and informed her how many people were scheduled on the day in question.

Griffin also prepared a daily schedule which indicated who was working where. Griffin and Karas discussed the daily schedule, which also had to be approved by Karas. If necessary, Karas determined who to move. With the exception of one or two occasions when a nurse's meeting was being held, Griffin did not use any

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[27] In what was perhaps a tactical move, Griffin was called to the stand by Petitioner. She testified after Barbara Butler, but before the other employee witnesses.

independent judgment in assigning employees. Such assignments came either from Karas or the charge nurse. When employees asked Griffin if they could be moved, she replied that she would do the best she could. At Karas' behest, she advised employees of transfers, or asked the nurse to transfer employees.

Employees were entitled to take eight personal days a year. Requests for personal days were submitted to Griffin, but had to be approved by Karas. Griffin looked to see if the employee had the time available. If he did, the request was approved. If he did not, the request was denied. Employees also gave requests for vacation time or vacation pay to Griffin.[28] Once an employee submitted a vacation request to Griffin, she took it to Karas for a response. At times, Karas asked Griffin, how many employees the facility would be short, if the labor pool had been contacted to cover the absence or if other employees had been asked if they wanted to work overtime. Griffin could not recall Karas ever denying a vacation request. In rare situations when the facility was overstaffed and an employee requested a day off, Griffin had the authority to grant the request.

State requirements dictated certain staffing minimums. Day shift required 15 geriatric aides, afternoons 12 aides and midnights nine aides. If these levels were not met, Griffin had the authority to authorize overtime. On January 24, a memo was sent to "all nurses" by Karas and Griffin outlining the minimums. Karas wrote the memo.

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[28] Vacation pay was paid on the employee's anniversary date, not when the vacation was taken.

Although Griffin's name was on the memo, her only involvement was typing it. The memo was posted with the schedule book and daily assignment sheet.[29]

Griffin attended some, but not all, supervisor's meetings. She was invited if the meeting dealt with personnel policies or meeting staffing requirements. Karas also attended these meetings. No other nurse assistants attended, but cooks attended one meeting.

In addition to interviewing applicants with Karas, Griffin interviewed five to 10 prospective employees by herself. These applicants were not pre-screened. In conducting these interviews, she made sure that all blanks on the application were filled out, the reference request was signed and, if the applicant was a prior Greenbriar employee, that she pulled the file. She asked the applicant if she was a certified nurses aide, asked where she worked previously to make sure the response matched the application. She did not ask about school grades or attendance at prior jobs. She did not contact references prior to advising the applicant that she was hired, but did this later as part of her job. She did not administer any tests. The only test given applicants was for the purpose of waiving the orientation period, and none of the applicants she interviewed by herself took this test. She was instructed to talk to the applicant, make sure she filled out the entire application, and that if the applicant was not a prior employee with a bad record, to hire her. If the applicant was a prior employee with a bad record, she

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[29] The aide/patient ratio was 1:8 on days, 1:12 on afternoons, and 1:15 on midnights. Petitioner Exhibit 3.

was to take the file and application to the administrator. This happened on one occasion and the prior employee was not rehired. She was told that if the applicant walked, talked and breathed, not necessarily at the same time, to hire her. Following the interview, she advised the applicant she was hired and gave a starting date.

Griffin wrote out and handed Disciplinary Action forms to Don and Mary Nidefski for absenteeism. She did this on the instruction of Karas who brought the absences to her attention. Griffin gave the Nidefskis the documents and explained they were disciplinary action forms. When they attempted to explain why they were absent, she advised them that there was a place for employee comments and they should write down whatever their comments were. On instruction from Karas, Griffin also signed and gave discipline forms to employees Katie Gardner and Lucy Prevale. Charge nurse Clara Cabala observed Gardner and Prevale sleeping on the job and advised Karas of this in Griffin's presence. Because Cabala did not put anything in writing on the incident, Karas asked Griffin to write up the incident as a verbal and to sign as the immediate supervisor, to affirm that she had heard what Cabala had reported.

On January 26, Griffin signed and sent letters to Frederick Ellis and Tarita Wilburn advising them that they were being "terminated due to unsatisfactory probation." On this same date, she signed and sent a letter to Renee Downer, a probationary employee, advising her that she was being terminated for three consecutive days of no-call/no-show. It was Youle's idea to send the letters. The letters were written jointly by Karas and Acheson, but Griffin was instructed by Karas to sign

them. Each of the three employees exercised appeal rights, and each was reinstated. Griffin played no part in the appeal.

Concerning the Copeland incident – at 3:00 a.m. on a Sunday morning, two aides, Judy Borchard and Mark Cobb, came to the personnel office where Griffin was working on time cards and stated they had something to show her. She followed them and found Copeland asleep. He stated to her that he was on his break. Griffin reported the incident to midnight nurse Dawn Prather. A few days later, at Youle's request, Griffin gathered the employee witnesses for a meeting to discuss disciplinary action against Copeland. Copeland was terminated, but Griffin had nothing to do with preparing the termination form, nor did she advise Copeland of his discharge. She did not know why the employees came to her to show her that Copeland was sleeping.

Griffin recalled only one occasion when she reported an employee for a performance problem. On this occasion, she saw a patient unclothed from the waist down with dried bowel movement on him. She reported the incident to the nurse. She did not recall verbally reprimanding employees, but did make statements to employees when she saw an uncovered linen cart to the effect, "We should probably keep this covered." This would be for infection control purposes.

Employees brought complaints to Griffin. She relayed those complaints to Karas. She told employees that they could talk to her, but advised them they should go to their immediate nurse supervisor, and if that didn't

work, to Karas or Assistant Director of Nursing Diane Jennings, and from there to Acheson and Youle.

Griffin did not consider herself to be a supervisor, but the administrative assistant to Karas. She felt she had no authority of her own. She was never told she had the authority to hire, fire, discipline, direct, promote, transfer, layoff, recall, reward, grant time off, reprimand employees or to effectively recommend such actions. She did not evaluate employees, either orally or in writing, or make recommendations or retention of probationary employees or hiring of pool employees. She acknowledged that some employees regarded her as a supervisor because she shared an office with Karas and they saw her doing changes on the schedule and saw their requests for personal days go through, but they did not see her conferring with Karas.

Irene Karas

Irene Karas was an Assistant Director of Nursing for Greenbriar and is currently Acting Director of Nursing for New Medico. She testified on behalf of New Medico concerning Griffin's duties and responsibilities as personnel coordinator. Karas was in charge or[sic] hiring nurses aides, scheduling geriatric aides, ensuring staffing ratios were met and handling workers' compensation, unemployment and MIOSHA matters. In addition, she hired special care aides and was involved in terminating employees from units other than geriatrics. She is the person who hired Griffin and was her direct supervisor. A summary of her testimony concerning Griffin follows.

The position of personnel coordinator was created because Karas needed an assistant to help with scheduling. Griffin was the third person to hold the position. The first two incumbents held the position for only a short time.[30]

Karas was responsible for staffing, and frequently was called at home if the facility was short-handed. She asked Griffin to make telephone calls to get people to come in, but she determined who was called and in what order.

Karas physically taught Griffin how to schedule. Scheduling was done for a six-week period. Every other weekend was immediately blocked. Requested off and personal days were then entered. Consideration was given for employees who worked parttime, who worked only on certain days, and who shared rides. Griffin had no authority to write the schedule the way she wanted to and Karas made changes after the schedule was submitted to her. Any scheduling problems had to be reported to Karas. If she was absent, problems were reported to Griffin. Aides were instructed to put scheduling requests in writing and put them in Karas' box. Employees also submitted requests directly to Griffin. Karas gave the requests to Griffin because she did the scheduling. In Karas' absence, Griffin could call employees in if so requested by a nurse, authorize employees to switch days, and make schedule changes. Karas, however, was not absent very often.

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[30] Karas acknowledged that the personnel coordinator position was unlike any other at the facility, either inside or outside the bargaining unit.

Griffin acted as Karas' assistant, but had no supervisory authority. Griffin interviewed one or two applicants, but never hired anyone or informed anyone that he was hired without confirmation from Karas. Karas hired Schultz. He came into the office and filled out the application. She took the application, initiated the interview, asked about his experience, discussed his wages and hired him for the midnight shift. Griffin gave him the test for waiving the orientation period, but the exam itself was graded by Jennings. Karas told Schultz when he would start. She believes she discussed with him his request to be off the last week in December.

With respect to discipline, Karas was instructed by Acheson to write up the Nidefskis for absenteeism. She in turn delegated the task of preparing the write-ups to Griffin. Griffin was not the Nidefskis' immediate supervisor, and had nothing to do with determining whether or not they were disciplined. She signed the document in the space for the immediate supervisor because she wrote it out.

Karas wrote the letters sent to Frederick Ellis, Renee Downer and Tarita Wilburn and asked Griffin to type them. Karas was aware that the letters went out over Griffin's signature, but found out too late. The letters should have gone out with her signature. Acheson reinstated each of the three employees. Griffin was not involved in these decisions.

Griffin reported to Karas that an employee was violating the dress code, but Griffin had no authority to discipline the employee herself.

Griffin did not attend any management meetings, but she may have attended meetings with Karas, Acheson and Jennings.

Karas does not believe employees considered Griffin to be a supervisor. She told employees that Griffin was in her office as her assistant and the personnel coordinator. When employee Janice Wiltshire asked exactly what Griffin's position was, Karas replied, "She works under me." When Wiltshire asked who she should go to for scheduling concerns, Karas told her to put her request in writing and place it in the box. Karas never advised any employee that Griffin was a supervisor. In addition to the Administrator, the in-service director, the director of nursing and two assistant directors of nursing, there would be five charge nurses on day shift.

ANALYSIS[31]

Section 2(11) of the Act defines a supervisor as:

> . . . any individual having authority, in the interest of the employer, to hire, transfer, suspend,

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[31] In its closing argument, Petitioner additionally contended that Griffin should be excluded from the unit as an office clerical employee, a specifically excluded classification. Much of the work Griffin performed in scheduling an [sic] handling requests for vacation, updating personnel files and keeping track of time cards and personal days are tasks commonly assigned to payroll or personnel clerks who are often found by the Board to be business office clericals. I note, however, that in the instant case Griffin's office as personnel coordinator was located in a patient care area, remote from the

(Continued on following page)

> lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercises of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The indicia of supervisory authority are to be read in the disjunctive; the possession of any one indicia is sufficient provided authority is exercised on behalf of the employer through the use of independent judgment and is not merely routine or clerical in nature.[32]

I note at the outset that Griffin was not an RN or LPN exercising professional or technical expertise for the benefit of patient care. Nor was she a highly skilled employee with many years of experience.

(Continued from previous page)

business office, and she appeared to have frequent contact with unit employees. Also, the record discloses that as office manager from January 25 to September 12, 1988, Griffin worked in the business office and that business office clericals received different vacation benefits and had dental coverage. At any rate, I find that there is insufficient evidence in the record to exclude Griffin as an office clerical. Since I have not excluded Griffin as a business office clerical, there is no need to determine whether or not she is a dual function employee because she worked as a nurse aide, a position advanced by New Medico.

[32] See *Delta Mills, Inc.*, 287 NLRB No. 38, slip op. at 12 (December 16, 1987), and the cases cited therein.

Interviewing and Hiring

Schultz testified that he was interviewed and hired by Griffin. Karas testified that she interviewed and hired Schultz. Based upon my observation of the witnesses, and their respective demeanor on the stand, I credit Schultz. He testified in a direct and forthright manner and was able to describe the circumstances of his hiring in detail. There is no direct conflict between Schultz and Griffin as Griffin was called to the stand before Schultz, did not specifically testify about his hiring, and was not recalled. I note that Griffin testified that she did not interview and hire anyone by herself who was given the test to waive the orientation period. To the extent a credibility resolution is required, I credit Schultz. Griffin was in a difficult situation. While I think she tried to testify honestly, she tended to shade her testimony to lessen her authority. It is of course possible that Griffin discussed hiring Schultz with Karas outside of his presence. But this is not Karas' testimony and there is no evidence in the record to support this conjecture.

Based on the evidence before me, I find that Griffin interviewed and hired Schultz. Further, I find it logical to conclude that the decision to hire Schultz was made before he began taking the test, since the only purpose of the test was waiver of the orientation period. I note that Karas did not introduce herself to Schultz until after he began taking the test.

I do not view the determination that Griffin hired Schultz as critical. Griffin testified that she interviewed and hired between five and 10 job applicants by herself.

Karas denied that Griffin hired anyone. Based upon my observation of their respective testimony, I credit Griffin.

A question remains as to whether Griffin, in hiring Schultz or other applicants, utilized independent discretion. I find that she did. The applicants were not prescreened and I view her testimony that she was instructed to hire anyone who walked, talked and breathed, not necessarily at the same time, as facetious. Although the facility may have been shorthanded, and its standards for hiring not high, if Greenbriar was willing to hire almost anyone, there would have been no need for an interview, and certainly no need for Griffin to ask the questions she did of Schultz.

Hiring is a primary indicia of supervisory authority. There is no credited testimony that Griffin's hiring decisions were reviewed by anyone with greater authority. The instant case is thus distinguishable from *Automated Waste Disposal, Inc.*, 288 NLRB No. 106 (May 11, 1988); *Coors Distributing Company of San Jose, Inc.*, 283 NLRB 328 (1987); *Bowne of Houston, Inc.*, 280 NLRB 1222 (1986). Accordingly, I find that Griffin is a supervisor within the meaning of Section 2(11) of the Act.

Discipline and Termination

Clearly, Griffin wrote out, signed as immediate supervisor, and handed to Donald and Mary Sue Nidefski the "Disciplinary Actions" issued to them on September 26, 1988. Similarly, she signed and gave written discipline to Katie Gardner and Lucy Prevale. On January 26, she signed and sent termination letters to Frederick Ellis,

Tarita Wilburn and Renee Downer. I credit Griffin's testimony that she was instructed by Karas to sign the termination letters.

At first blush, this appears to be fairly conclusive evidence of supervisory authority. Griffin testified, however, that she prepared and issued the written warnings on instructions from Karas; and that the termination letters were written by Karas and Acheson at the suggestion of Administrator Youle. I credit Griffin's testimony that she did not determine or effectively recommend issuance of any of the above-described documents. Her reluctance to discuss the discipline with the Nidefskis is an indication to me that she was not directly responsible for the warnings. Accordingly, I find that in issuing the warnings and termination letters, Griffin was not exercising independent judgment, but was acting as a conduit for management. *Rich's Precision Foundry, Inc.*, 262 NLRB 678, 679 (1982); *Bowne, supra.*

Copeland Incident

Borchard and Cobb testified that when they brought Griffin to where Copeland was sleeping, she instructed him to wake up and return to work. Griffin then went to nurses Kennedy and Prather and asked them to write letters concerning occasions when they had observed Copeland sleeping. A few days later, Griffin gathered employee witnesses for a disciplinary hearing. She participated in that hearing, asking questions and providing documents from Copeland's file. I credit the testimony of Borchard and Cobb, as it is essentially uncontradicted.

There is no evidence that Griffin discharged Copeland or effectively recommended such action. If she had, there would have been little need for the disciplinary hearing. I think it reasonable to infer, however, that she initiated the process which led to the disciplinary hearing. Clearly, Cobb and Borchard viewed her as a person who could solve their dilemma. Cobb in particular was dissatisfied with the response of the nurses who merely awakened Copeland. I note that Griffin did not ask the employees why they sought her out. Rather, she took steps to resolve the problem. A few days later, she gathered employees for the hearing, sat next to Youle, handed him documents and asked Copeland if he was saying he wasn't sleeping.

I find that in the Copeland incident, particularly in instructing Copeland to wake up and return to work, asking the nurses to prepare letters on Copeland and initiating the process which led to the disciplinary hearing. Griffin exercised independent judgment indicative of supervisory status.

Authority to Approve Overtime

I find that Griffin had the authority to, and did, approve overtime. I do not find, however, that in doing so she exercised independent discretion. State staffing requirements stipulate minimum staffing levels. There is no evidence that Griffin could require employees to work overtime. Authorizing volunteers to work overtime in order to meet minimum staffing requirements in accordance with state and facility requirements does not involve independent discretion. *Beverly Enterprises d/b/a*

Beverly Manor Convalescent Centers, 275 NLRB 943, 946 (1985).

I note, however, that the charge nurses, who were stipulated to be supervisors for purposes of this proceeding and who had authority to grant overtime, deferred to Griffin in this area.

Scheduling

I find that preparing the schedule itself is a fairly routine procedure and not evidence of supervisory authority.

I credit the testimony of Borchard and Cobb that Griffin gave them permission to take a day off on the date of the Copeland hearing. I also credit Schultz's testimony that on the date he was hired he obtained approval from Griffin to take off the last week in December 1988. I credit Don Nidefski's testimony that when he went to Griffin with requested schedule changes, she looked at the schedule and either approved or disapproved the requests. In each case, she gave an immediate response without checking with anyone. I view this as an element of independent discretion indicative of supervisory authority.

Attendance at Supervisor's Meetings

Griffin testified that she attended some supervisors meetings. Karas testified that Griffin did not attend supervisors meetings. I credit Griffin. Attending such meetings is a secondary indicia of supervisory authority.

Resolving Employee Grievances

Cobb testified that he talked to Griffin about problems with his paycheck. He showed her the error in calculating his hours and she stated that he could pick up his check the following Monday or Tuesday. Butler brought payroll problems to Griffin and asked her to recheck her figures. The record evidence provides insufficient evidence to determine how much independent judgment was involved in these situations. Accordingly, I do not find supervisory status as a result of Griffin's efforts to resolve pay discrepancies.

I find that Griffin exercised independent judgment on behalf of the Employer in hiring between five and 10 job applicants; in ordering Copeland to wake up and return to work, asking nurses to prepare letters on Copeland sleeping and initiating the process which led to the disciplinary hearing; and, in approving employee requests for schedule changes. According, I find that she is a supervisor within the meaning of Section 2(11) of the Act. *Wilco Business Forms, Inc.*, 280 NLRB 1336, 1342 (1986); *Granco, Inc. d/b/a Thrifty Supermarket*, 276 NLRB 1450 (1985).

I also find, based upon the evidence set forth above, that as personnel coordinator, Griffin's community of interest was more closely aligned with management than with unit employees, and that she possessed important indicia of supervisory authority such that she should be excluded from the unit. *Memphis Truck, supra*, JD slip op. at 16.

Additionally, I find that Greenbriar created the impression among its employees that Griffin was a supervisor. She interviewed applicants, both alone and with

Karas; signed and issued written warnings as immediate supervisor; told the Nidefskis that it was part of her job to issue written warnings and enforce policies; signed termination letters, attended supervisors meetings; accepted and acted on employee requests for schedule changes, vacation days and vacation pay; assisted employees in resolving pay discrepancies; authorized overtime under circumstances where charge nurses deferred to her; and, shared an office with an acknowledged supervisor. Further, a memo on staffing ratios and requirements for authorization of overtime was issued to charge nurses from Karas and Griffin and a telephone list kept at nursing stations contained a handwritten notation that Griffin should be called in the event of staffing problems. Under these circumstances, I find that employees could reasonably conclude that Griffin was a supervisor. *Bar and Barbeque Products, Inc.*, 229 NLRB 1058, 1059 (1977); *Howard Johnson Company*, 210 NLRB 376, 380.

I recommend that the challenge to the ballot of Susan Griffin be sustained.

IV. RECOMMENDATIONS

Based upon the findings of fact and credibility resolutions set forth herein, and the record as a whole, I recommend that:

1. In accordance with the stipulation of the parties, the challenges to the ballots of Christine Schullar and Margie Kuhn be overruled;

2. In accordance with the stipulation of the parties, the challenges to the ballots of Joan Kehres and Barbara McCreary be sustained;

3. The challenge to the ballot of Susan Griffin be sustained;

4. No ballots be opened, and the Board issue a Second Revised Tally of Ballots reflecting that the two unsustained challenged ballots are no longer determinative;

5. New Medico be found to be a successor to Greenbriar;

6. The Board issue a Certification of Representative designating Petitioner as the exclusive collective bargaining representative of employees in the bargaining unit set forth above, substituting New Medico for Greenbriar as the Employer.

EXCEPTIONS

PLEASE TAKE NOTICE that within fourteen (14) days of issuance of this report any party may file with the National Labor Relations Board in Washington, DC, an original and seven (7) copies of exceptions to such report with or without supporting brief, in accordance with Section 102.69 of the Board's Rules and Regulations, Series 8, as amended. Immediately upon the filing of such exceptions, with or without brief, the party filing same shall serve a copy thereof, together with a copy of any brief filed, upon the other parties and shall file copies with the Regional Director for the Seventh Region and submit to the Regional Director proof of such service. If

no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

Dated at Detroit, Michigan, this 28th day of July, 1989.

/s/ Raymond Kassab
Raymond Kassab, Hearing Officer
National Labor Relations Board
Seventh Region
Patrick V. McNamara
Federal Building
Room 300, 477 Michigan Avenue
Detroit, Michigan 48226

APPENDIX E

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

NEW MEDICO HEALTH CARE CENTER OF MICHIGAN, INC.,

Respondent.

_____/

Cir. Court Case No. 91-5271
NLRB Case No. 7-CA-30357

RESPONDENT'S MOTION TO RECALL MANDATE PENDING APPLICATION FOR WRIT OF CERTIORARI

NOW COMES Respondent, NEW MEDICO HEALTH CARE CENTER OF MICHIGAN, INC., ("New Medico") by and through its attorneys, ABBOTT, NICHOLSON, QUILTER, ESSHAKI & YOUNGBLOOD, P.C., and hereby moves this Court to recall its mandate pending application for Writ of Certiorari. In support of this motion, Respondent states:

1. The appeal before this Court concerns the application by the National Labor Relations Board ("Board") for enforcement of its Order requiring New Medico to engage in collective bargaining with the American Federation of State, County and Municipal Employees ("AFSCME") as a successor employer to Greenbriar Care Center ("Greenbriar").

2. On March 1, 1990 the Board issued an Order certifying AFSCME as the collective bargaining representative for a unit of employees employed by Greenbriar. On March 26, 1990 the Board, without explanation, amended this certification to cover a unit of employees employed by New Medico.

3. On December 20, 1991, this Court issued a per curiam opinion enforcing the Board's Order requiring New Medico to engage in collective bargaining with AFSCME.

4. On January 13, 1992, this Court issued its mandate.

5. New Medico denies it committed any violations of the National Labor Relations Act by refusing to bargain with AFSCME, because all eligible voters were not permitted to have their ballots opened and counted in the NLRB election. Further, New Medico is not the legal successor to Greenbriar, and the test for determining successorship status, as set forth by the United States Supreme Court, was not properly applied. For this reason, New Medico intends to file a Petition with the United States Supreme Court for a Writ of Certiorari, requesting review of the present matter. The Petition for a Writ of Certiorari must be filed by March 19, 1992.

6. In petitioning for a Writ of Certiorari, New Medico will challenge the propriety of the Board's evaluation of the successorship issue, and in particular the date on which successorship status was evaluated. The Board analyzed the successorship issue as of March 1, 1989, the date that New Medico took over the facility from Greenbriar. At that time there was no recognized or certified

Union representative for any employees at the facility. AFSCME was certified as the collective bargaining representative for a unit of employees employed by Greenbriar at the Howell facility on March 1, 1990. AFSCME did not request that New Medico bargain with it as the alleged successor to Greenbriar until March 7, 1990. Nevertheless, the Board concluded that New Medico's refusal to bargain with AFSCME constituted an unfair labor practice because of its alleged successorship status as of March 1, 1989, even though there was no recognized or certified bargaining agent at the facility, and no demand by the AFSCME that New Medico recognize or bargain with it, at that time.

7. The Board's decision, which has been affirmed by this Court, is directly contrary to the United States Supreme Court's holding in *Fall River Dyeing & Finishing v. N.L.R.B.*, 482 U.S. 27, 125 L.R.R.M. 2441 (1987), wherein the Court wrote:

> "The successor's duty to bargain at the 'substantial and representative complement' date is triggered only when the union has made a bargaining demand."

8. This Court recognized that this was a "novel" issue of law, with no reported precedent. This Court then explained that it was declining to accept New Medico's position with respect to this issue, and thus has failed to follow Supreme Court precedent, because "public policy" favored the Board analysis. This Court further explained, "Any other position only encourages new owners to circumvent its obligations by filing challenges to certification." December 20, 1991 Slip Op. at p. 6. However, New Medico respectfully submits that, where certifications are

improperly issued, an employer has no choice but to challenge it. Such challenge should not provide the basis for ignoring Supreme Court precedent.

9. In order to preserve the status quo, and to preserve the integrity of the Supreme Court's decision in *Fall River*, the Sixth Circuit should recall its mandate, pending New Medico's application for a Writ of Certiorari so that the Supreme Court may decide whether it wishes to modify the *Fall River* decision.

WHEREFORE, Respondent, NEW MEDICO HEALTH CARE CENTER OF MICHIGAN, INC., respectfully requests that this Honorable Court enter an Order recalling the Mandate pending New Medico's application for a Writ of Certiorari.

Dated: January 23, 1991

Respectfully submitted,

/s/ ABBOTT, NICHOLSON, QUILTER, ESSHAKI & YOUNGBLOOD, P.C.

By: /s/ James B. Perry
James B. Perry (P 28027)
Attorneys for Respondent
19th Floor, One Woodward Ave.
Detroit, Michigan 48226
(313)963-2500

26:3228:012192

APPENDIX F

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
538 U.S. POST OFFICE & COURTHOUSE BUILDING
CINCINNATI, OHIO 45202-3988

LEONARD GREEN
CLERK

TELEPHONE
(513) 684-2953
FTS 684-2953

February 3, 1992

James B. Perry, Esq.
Abbott, Nicholson, Quilter, Esshaki & Youngblood
1 Woodward Avenue
19th Floor
Detroit, MI 48226-3412

RE: 91-5271
NLRB vs. New Medico Health
District Court No. 7-CA-30357

Dear Mr. Perry:

This letter is to advise that your motion to recall the mandate in the above styled case has been denied.

Very truly yours,
Leonard Green, Clerk
/s/ Yvonne Henderson
Yvonne Henderson
Deputy Clerk

cc: Ms. Aileen A. Armstrong
Mr. Paul J. Spielberg
Ms. Karen L. Arndt
Mr. Bernard Gottfried
Mr. Michael Blum

APPENDIX G

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GREENBRIAR CARE CENTER, INC. — Case 7-RC-18856

and

NEW MEDICO HEALTH CARE CENTER OF MICHIGAN, INC.

Employer

and

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

Petitioner

ORDER CORRECTING

On March 1, 1990, the National Labor Relations Board issued a Decision and Certification of Representative in the above-entitled proceeding in which an inadvertent error appears.

IT IS ORDERED that said Decision is corrected by striking the appropriate unit in its entirety and substituting the following appropriate unit:

> All full-time and regular part-time nurses aides, physical therapy aides, laundry employees, activity employees, dietary aides, cooks, housekeeping employees, ward clerks and maintenance employees employed by New Medico

Health Care Center of Michigan, Inc., at its facility located at 3003 W. Grand River Avenue, Howell, Michigan; but excluding all LPN's, RN's, technical employees, respiratory therapists, office clerical employees, casual employees, temporary employees, guards, and supervisors as defined in the Act.

Dated Washington, D.C., March 26, 1990.

By direction of the Board:

John J. Toner

Associate Executive Secretary

Supreme Court, U.S.
FILED
MAY 22 1992
OFFICE OF THE CLERK

No. 91-1525

In the Supreme Court of the United States

OCTOBER TERM, 1991

NEW MEDICO HEALTH CARE CENTER OF MICHIGAN, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
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NORTON J. COME
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Washington, D.C. 20570

QUESTIONS PRESENTED

Before petitioner took over its predecessor's operations and hired virtually all of its predecessor's workforce, the National Labor Relations Board (Board) held an election in which the employees of petitioner's predecessor selected the Union as their exclusive collective-bargaining representative. Because the Board had to resolve challenges to some of the ballots cast in the election, however, the Union was not certified until after petitioner assumed its predecessor's operations.

1. Did the Board correctly rule that petitioner, as the successor to the previous employer, violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the Union?

2. Was petitioner entitled to litigate the successorship issue before an administrative law judge in an unfair labor practice proceeding after already litigating the issue before a hearing officer in the prior representation proceeding?

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1525

NEW MEDICO HEALTH CARE CENTER OF MICHIGAN, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A12, is unpublished, but the judgment is noted at 951 F.2d 350 (Table). The decision and certification of representative issued by the National Labor Relations Board (Board) in the underlying representation proceeding, Pet. App. A13-A15, is unreported. The Board's decision and order in the unfair labor practice proceeding, Pet. App. A16-A24, is reported at 299 N.L.R.B. No. 50.

JURISDICTION

The decision and judgment of the court of appeals was filed on December 20, 1991. The petition for a writ of certiorari was filed on March 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Prior to March 1, 1989, Greenbriar Care Center (Greenbriar) operated a nursing care facility at premises leased from Health and Rehabilitation Properties Trust (HRPT). On December 15, 1988, the American Federation of State, County, and Municipal Employees, AFL-CIO (Union) filed a petition with the Board seeking certification as the collective bargaining representative of a bargaining unit which included various classes of Greenbriar employees. In early January 1989, Greenbriar and the Union stipulated to a consent election; and on February 17, 1989, the Board conducted the election. Pet. App. A3, A25-A26. In that election, 41 employees voted in favor of the Union, 37 voted against it, and ten ballots challenged by the Union were not counted. Pet. App. A26-A27. Because the ten challenged and uncounted ballots could determine the election's outcome, the Board was required to resolve the challenges.

Sometime before the election, however, Greenbriar failed to meet its lease obligations to HRPT. As a result, in late January 1989, an official of HRPT contacted petitioner, New Medico Health Care Center of Michigan, Inc., to inquire whether it was interested in operating the Greenbriar facility. Pet. App. A3. On February 17, 1989—the day of the election—petitioner agreed to lease the facility for a three-year term beginning March 1, 1989. Ten days after the election, on February 27, 1989, petitioner sent letters

to Greenbriar employees notifying them that it was going to assume Greenbriar's lease. The letter encouraged Greenbriar employees to apply for positions with petitioner and informed them that petitioner would consider years of service with Greenbriar in establishing wages, which were to be higher than Greenbriar's. Petitioner also noted in its letter that those it hired would receive credit for seniority accumulated at Greenbriar. Pet. App. A3. In addition, petitioner referred to the February 17 election, stating that it would prefer not to deal with a union but, if one were certified, petitioner would bargain in good faith. *Id.* at A38-A39 n.17.

On March 1, 1989, petitioner began operating the former Greenbriar facility.[1] However, it denied that it was a successor to Greenbriar and, consequently, disputed whether it succeeded to any of Greenbriar's obligations to the Union. Accordingly, the Board's Regional Director ordered a Hearing Officer to take testimony and resolve factual disputes concerning two questions: (1) whether the challenged ballots should count in the election; and (2) whether petitioner was Greenbriar's successor and therefore succeeded to any bargaining obligation imposed on Greenbriar as a result of the election. Pet. App. A28-A29.

2. After taking testimony, the Hearing Officer recommended that the Board certify the Union as the bargaining representative of the various classes of petitioner's employees. On the successorship issue, the Hearing Officer found that "a substantial continuity of the employing enterprise," within the mean-

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[1] Petitioner learned of the election prior to the March 1 closing date and could have cancelled its agreement but, because of its past relationship with HRPT, did not. Pet. App. A38.

ing of *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), existed between petitioner and Greenbriar. Pet. App. A35-A36. Rejecting petitioner's argument that its planned upgrade of the facility and creation of a traumatic head injury rehabilitation unit would change the nature of the enterprise, the Hearing Officer found that petitioner

> operates a nursing care center as did its predecessor, Greenbriar. It commenced operation without hiatus in the same facility, utilizing a virtually identical workforce, holding the same or similar jobs, under the same or similar working conditions, working under the same supervisors and with the same non-unit employees, caring for the same patients, with at least some of the same equipment. Unit employees worked one day for Greenbriar, the next for [petitioner]. Job applications and W-4 forms for [petitioner] were not filled out until several days after the takeover. Time worked for Greenbriar was credited as time worked for [petitioner] for certain wage and benefit purposes. It is difficult to imagine a greater degree of continuity.

Id. at A36-A37. Applying the Board's "substantial and representative complement" test—endorsed by this Court in *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 28 (1987)—the Hearing Officert further found that petitioner had hired a substantial and representative complement of employees as of March 1, 1989, the day it commenced operating the former Greenbriar facility. Pet. App. A38.

Petitioner contended before the Hearing Officer, as it does in its petition, that it had no obligation to bargain with the Union because the Union had not been recognized by Greenbriar or certified by the Board prior to March 1, 1989, the date it took over

the facility. The Hearing Officer rejected that argument, reasoning that, had the "challenged ballots not been determinative, and had [the Union] received a majority of the ballots cast, [petitioner], as a successor, would have been obligated on March 1[, 1989,] to bargain with [the Union]. It would * * * go contrary to the purposes and policies of the Act, to find that[,] because of determinative challenges [to certain ballots,] no obligation exists [even though it turns out that the Union] receive[d] a majority of the votes." *Id.* at A42.

The Hearing Officer then turned to the challenged ballots. He found that, after all challenges were resolved, the Union had maintained an election victory.[2] Accordingly, the Hearing Officer recommended that the Board find petitioner a successor to Greenbriar and certify the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit. Pet. App. A69.

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[2] Prior to the hearing, the parties agreed that five of the ten challenged ballots should be opened and counted. The corrected tally of ballots showed 43 votes for and 40 votes against the Union. The remaining five ballots were challenged by the Union on the ground that the individuals were supervisors within the meaning of Section 2(11) of the Act, 29 U.S.C. 152(11). Pet. App. A27-A28. During the hearing, petitioner, Greenbriar, and the Union stipulated that two of the remaining five ballots be opened and counted and two remain sealed and uncounted, leaving only one ballot in dispute. *Id.* at A43. That ballot was cast by Susan Griffin, whom the Hearing Officer ultimately found to be a supervisor; he therefore recommended that the challenge be sustained. *Id.* at A68. Since the two ballots which petitioner and the Union had stipulated should be opened and counted were no longer determinative (as the Union held a 3-vote lead), the Hearing Officer recommended that they not be opened. *Id.* at A69.

3. On March 1, 1990, the Board issued a decision adopting the Hearing Officer's findings and recommendations and certified the Union. Pet. App. A13-A15.[3] When petitioner refused to bargain, the Union filed an unfair labor practice charge. The Board's General Counsel issued a complaint and moved for summary judgment on the ground that all issues relevant to the unfair labor practice charge were, or could have been, litigated in the representation proceeding. The Board granted summary judgment, finding that petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and ordered petitioner to bargain with the Union. Pet. App. A16-A24.

4. The court of appeals enforced the Board's order in an unpublished per curiam opinion. Pet. App. A1-A12. The court held that substantial evidence supported the Board's finding of "substantial continuity" betwen the enterprises operated by Greenbriar and petitioner. *Id.* at A7. It also rejected petitioner's contention that the successorship determination should have been made as of the date the Board certified the Union and not the date petitioner began operating the former Greenbriar facility. Finding "no cases that address the situation at bar," *id.* at A8, the court followed the Board's reasoning. It explained:

> Clearly, the successorship issue would have been determined as of March 1, 1989, had the challenged votes not been determinative. We can think of no reason why the result should be dif-

[3] The Board's decision named Greenbriar as the employer in its description of the appropriate bargaining unit. Pet. App. A14. The Board subsequently corrected this inadvertent error. *Id.* at A76-A77; *id.* at A19 n.4.

> ferent because it took more than a year to resolve the election. Any other position only encourages new owners to circumvent [their] obligations by filing challenges to certification. By the time these challenges are resolved, the bargaining unit may no longer represent "a substantial and representative complement" of employees.

Id. at A8.

The court also rejected petitioner's claim that it was entitled to litigate the successorship issue before an administrative law judge. Pet. App. A8-A9. The court explained that petitioner's liability in the unfair labor practice proceeding turned on its successorship status, an issue that was appropriately and previously resolved in the representation proceeding. *Id.* at A9.[4]

ARGUMENT

In *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), this Court concluded that imposing a bargaining obligation on a new employer is appropriate when the new employer maintains substantial continuity in the operation of its predecessor's business so that "the bargaining unit remains unchanged" and "a majority of [the successor's] employees * * * were employed by the preceding employer." *Id.* at 279, 281. In *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27 (1987), this Court reiterated that, "[i]f the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of [Section] 8(a)(5) is activiated." *Id.* at 41. The

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[4] The court also upheld the Board's finding that Griffin was a supervisor. Pet. App. A9-A12. Petitioner does not seek further review of this finding.

Court went on to state that *Burns* had approved "the approach taken by the Board and accepted by courts with respect to determining whether a new company was indeed the successor to the old," and that this approach "is primarily factual in nature and is based upon the totality of the circumstances of a given situation." *Id.* at 43. In this case, the Board, upheld by the court of appeals, found that petitioner substantially continued the operations of Greenbriar and hired a majority of its workforce. Accordingly, it held that petitioner succeeded to Greenbriar's bargaining obligations. Because that determination is both correct and consistent with the decisions of this Court, the courts of appeals, and Board precedent, further review is unwarranted.

1. Petitioner contends that because there was no certified or recognized bargaining relationship between the Union and Greenbriar on March 1, 1989, the day petitioner began operating the facility, *Burns* and *Fall River* are not applicable here. Pet. 14-18, 21. It is true, as petitioner notes, Pet. 14-18, that the union in *Burns* had been certified before—just before—the new employer assumed its predecessor's operations. But in *Fall River*, the Court made clear that *Burns* was "not limited to a situation where the union in question has been recently certified." 482 U.S. at 41. Rather, it applies "even if [the] union * * * has not been certified just before the transition in employers," as long as there is a presumption that the Union is or remains the employees' bargaining representative. *Id.* at 37, 41.

Here, there was such a presumption. Under consistent Board precedent, an employer's obligation to bargain is established as of the date of an election in which a majority of the bargaining-unit employees

vote for union representation, regardless of when the union receives Board certification. See *Howard Plating Indūs.*, 230 N.L.R.B. 178, 179 (1977). Thus, the Board has long held that:

> [A]bsent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made. * * * Such changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued.

Mike O'Connor Chevrolet-Buick-GMC Co., 209 N.L.R.B. 701, 703 (1974), enforcement denied on other grounds, 512 F.2d 684 (8th Cir. 1975) (footnote omitted). Regardless of the pendency of such objections, as of the date of the election, "the [u]nion [becomes] the statutory collective-bargaining representative of the employees * * *. From that moment forward it [is] entitled to notice and an opportunity to bargain collectively over [any changes in terms and conditions of employment] that might be effectuated thereafter." *Bundy Corp.*, 292 N.L.R.B. 671, 677 (1989). An employer is obligated to give the union notice and the opportunity to bargain because of the "presumptive status of the [u]nion as collective bargaining representative during the interim." *Sundstrand Heat Transfer, Inc.* v. *NLRB*, 538 F.2d 1257, 1259 (7th Cir. 1976). Accord *NLRB* v. *Allied Products Corp.*, 548 F.2d 644, 653 (6th Cir. 1977). As a result, Greenbriar's bargaining obligation commenced on February 17, 1989, when a majority of its employees voted for union representation; peti-

tioner succeeded to that obligation when it became Greenbriar's successor on March 1, 1989.

2. Petitioner also contends, Pet. 21-23, that its successorship status should have been determined as of March 7, 1990, the date the Union made a bargaining demand on it, rather than as of March 1, 1989, the date on which petitioner assumed Greenbriar's operations.[5] Ordinarily, "[t]he successor's duty to bargain * * * is triggered only when the union has made a bargaining demand." *Fall River*, 482 U.S. at 52. But an employer's decision to contest the union's certification at a Board representation proceeding is, in effect, a rejection of a bargaining demand. See *Honda of America Mfg., Inc.*, 259 N.L.R.B. 389, 390 & n.3 (1981). In such circumstances, there is no need for the union to make a "demand" for recognition: The employer is already aware that the union seeks to maintain its representative status by reason of the union's continuation of proceedings before the Board; and the employer's decision to contest the union's certification, in turn, provides the union with notice that the employer will not bargain with it until its status is resolved. Settled Board law has long so held, *Honda of America Mfg., Inc., supra*, and petitioner offers no compelling reason why the law should be otherwise.[6]

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[5] According to petitioner's projections at the hearing, the predecessor's workforce might be only a minority of its workforce by March 1990; in addition, by then its operations may have changed sufficiently to preclude a substantial continuity finding.

[6] The Board has similarly held that, whether or not the union has requested bargaining, an employer commits an unfair labor practice by making unilateral changes in terms and conditions of employment during the pendency of election objections if the union is later certified. See *Laney & Duke*

By litigating the successorship issue and the challenged ballots, petitioner here sent the Union a clear signal that, pending final resolution of those matters, it would not honor a request for recognition or bargaining. Similarly, by continuing its bid for recognition, the Union made it obvious that it sought to retain its representative status. Because those actions were the equivalent of a demand for bargaining and rejection of that demand, the appropriate date for assessing petitioner's successorship was the date petitioner took over Greenbriar's operations, March 1, 1989. See *Honda of America Mfg., Inc., supra.* The Board and the court of appeals were correct to so hold.

3. Petitioner's final contention—that an Administrative Law Judge, rather than a Hearing Officer, should have resolved the successorship issue, Pet. 24-28—is both meritless and jurisdictionally barred.

In general, an employer cannot obtain direct court review of a Board decision certifying a union as the bargaining representative of its employees. If the employer believes that the Board's decision in the representation proceeding is erroneous and the union's resulting certification invalid, it must test the decision by refusing to bargain with the union. That refusal, in turn, will draw an unfair labor practice charge from the union which may form the basis of a complaint by the Board's General Counsel. If the Board finds that the refusal to bargain violates Section 8(a)(5) and orders the employer to bargain, *then* the employer may obtain court review of *both* the order in the unfair labor practice proceeding and

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Storage Warehouse Co., 151 N.L.R.B. 248, 266-267 (1965), enforced in relevant part, 369 F.2d 859 (5th Cir. 1966). See also *Adair Standish Corp.*, 290 N.L.R.B. 317, 329 (1988).

the decision to certify the union in the underlying representation proceeding. In such circumstances, the unfair labor practice proceeding under Section 8(a)(5) and the prior representation proceeding "are really one." *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 158 (1941). As a result, issues which were or could have been litigated in the representation proceeding cannot be litigated in the unfair labor practice proceeding. See *id.* at 161-162. Accord *Magnesium Casting Co.* v. *NLRB*, 401 U.S. 137, 141 (1971); *Fall River Savings Bank* v. *NLRB*, 649 F.2d 50, 58-59 (1st Cir. 1981); *Retail Clerks Union, Local 1401* v. *NLRB*, 463 F.2d 316, 322-325 (D.C. Cir. 1972). This makes sense: Where the employer has already had the opportunity to litigate an issue in the representation proceeding, there is no reason to permit relitigation of the issue in the subsequent unfair labor practice proceeding.

Here, petitioner litigated the successorship issue in the representation proceeding and put its arguments concerning the finding of successorship before the Board in its exceptions to the Hearing Officer's findings and recommendations. It lost. It then sought to put those same arguments before an Administrative Law Judge and the Board in the unfair labor practice proceeding. Because petitioner's arguments had already been rejected once, there was no reason for further proceedings and the Board granted summary judgment against petitioner. Petitioner's only recourse was to the courts; it had no right to relitigate the issues before the Board.

Petitioner does not disagree with "the general principle that, where representation case findings are 'related' to subsequent unfair labor practice proceedings, such findings may not be relitigated in an unfair labor practice hearing [before an adminis-

trative law judge]." Pet. 24. However, it asserts that the principle is inapplicable here. Petitioner is mistaken. In *Amalgamated Clothing Workers of America* v. *NLRB*, 365 F.2d 898, 902-905 (1966), the Court of Appeals for the District of Columbia Circuit explained that findings made in a representation proceeding may not be relitigated in a "related" unfair labor practice proceeding if the employer's defense to the unfair labor practice charge is simply a challenge to the result of the representation proceeding. In other words, where the employer defends against the unfair labor practice charge by disputing the validity of the union's certification, the Board will not hear the employer's challenge. However, where the defense to the unfair labor practice charge is independent of the validity of the union's certification, the issue may be litigated in the unfair labor practice proceeding.[7] The Board adopted the Court of Appeals for the District of Columbia Circuit's interpretation in *Serv-U-Stores*, 234 N.L.R.B. 1143 (1978), and the courts of appeals have agreed with it consistently ever since. See, *e.g.*, *Sahara Datsun, Inc.* v. *NLRB*, 811 F.2d 1317, 1321 (9th Cir. 1987); *NLRB* v. *Dillon Stores*, 643 F.2d 687, 690 (10th

[7] For example, where the issue of an individual's supervisory status pertains to whether he or she was properly included in the unit for purposes of determining whether the union won an election, the issue cannot be relitigated. However, the issue of supervisory status may be relitigated where it is relevant to a determination of whether an employer unlawfully discharged an individual for engaging in protected activity, *e.g.*, *Heights Funeral Home, Inc.* v. *NLRB*, 385 F.2d 879 (5th Cir. 1967), or whether an alleged supervisor unlawfully interfered with employees' protected activities, *e.g.*, *Amalgamated Clothing Workers* v. *NLRB*, 365 F.2d 898, 902, 905 (D.C. Cir. 1966).

Cir. 1981); *Rock Hill Telephone Co.* v. *NLRB*, 605 F.2d 139, 143 (4th Cir. 1979); *Riverside Press, Inc.* v. *NLRB*, 415 F.2d 281, 284-285 (5th Cir. 1969), cert. denied, 397 U.S. 912 (1970).[8]

In this case, neither the unfair labor practice charge nor petitioner's defense to it was independent of the Union's certification; instead, petitioner defended against the charge by challenging the certification decision made in the representation proceeding. Petitioner concedes as much, admitting that it refused to bargain with the Union because "it believed the [Union's] certification by the Board to be in error." Pet. 11. Even the theory petitioner asserted —that certification of the Union as the bargaining representative of its employees was improper because petitioner did not succeed to Greenbriar's bargaining obligation—was the same theory petitioner advanced in the representation proceeding. As the court of appeals correctly noted, Pet. App. A9, petitioner's "liability for [Section 8(a)(5)] violations depend[ed] on whether the election yield[ed] Certification." Because petitioner had already litigated the successor-

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[8] In *Foothill Electric Corp.*, 120 N.L.R.B. 1350 (1958), Pet. 28, the Board allowed the union to litigate the validity of a contractual union-security clause in a representation proceeding because it was material to the union's claim that it was properly elected as the employees' bargaining representative —*i.e.*, to whether the Board's contract bar rules precluded the holding of an election at that time. In *Lawrence Typographical Union* v. *McCulloch*, 349 F.2d 704 (D.C. Cir. 1965), Pet. 28, the court held that a district court had no jurisdiction to enjoin a decertification petition on an allegation that the Board had improperly refused to admit evidence pertaining to a related unfair labor practice complaint in the decertification proceeding. Neither case supports petitioner's contention that the Board was precluded from determining the successorship issue here in the representation proceeding.

ship issue in the representation proceeding, the Board's refusal to permit its relitigation in the unfair labor practice proceeding was undeniably correct.[9]

In any event, review of this issue is jurisdictionally barred. Under Section 10(e) of the Act, 29 U.S.C. 160(e), the courts lack jurisdiction to consider any issue not urged before the Board. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers'*

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[9] Petitioner's argument that the Board violated the procedures in its Casehandling Manual, Pet. 26-28, is simply wrong. Section 11420.1 of the Manual, on which petitioner relies, Pet. 26-27, applies to *independent* unfair labor practice claims which are pending during the representation proceeding. As explained above, the unfair labor practice claim here and petitioner's defense to it were *not* independent of the representation proceeding; instead, petitioner defended against the unfair labor practice charge by challenging the result of the representation proceeding, the Union's certification. In any event, nothing contrary to the Manual, even as misconstrued by petitioner, happened here. Contrary to petitioner's assertion, Pet. 28, the Hearing Officer never "found" that petitioner participated in an unfair labor practice. See Pet. App. A25-A70. Nor did he recommend that the Board do so. *Id.* at A68-A69. In fact, no unfair labor practice determination was made until five months *after* the Board had adopted the Hearing Officer's findings and recommendations on the representation issue. See Pet. App. A13-A15 (Decision dated March 1, 1990, adopting the Hearing Officer's findings and recommendations and certifying the Union); Pet. App. A16-A24 (Decision and Order, dated August 9, 1990, finding that petitioner committed an unfair labor practice by refusing to bargain with the employees' duly certified representative). And then, the unfair labor practice decision was made by the Board on a motion for summary judgment, not by a Hearing Officer. That was the appropriate procedure, as no facts were in dispute: The Board had already held the Union properly certified in a prior proceeding, and petitioner had conceded that it had refused to negotiate with the Union.

Union v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).[10] Petitioner could have objected to having the Hearing Officer resolve the successorship issue when petitioner filed its exceptions to the Hearing Officer's findings and recommendation with the Board. See p. 12, *supra*. It did not. Consequently, petitioner was also barred from raising the issue in the unfair labor practice proceeding. See *Magnesium Casting Co.*, 401 U.S. at 141; *Fall River Savings Bank*, 649 F.2d at 58-59; *Retail Clerks Union, Local 1401*, 463 F.2d at 322-325. Because petitioner failed to timely bring before the Board its objection to having a Hearing Officer resolve the successorship issue, the courts lack jurisdiction to hear it. *Woelke & Romero Framing, Inc., supra; International Ladies' Garment Workers' Union, supra.*[11]

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[10] Section 10(e) provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Petitioner offers no excuse for its failure to timely raise the issue before the Board, no less the "extraordinary circumstances" required by the statute. Although the Board raised Section 10(e) below, see Board C.A. Br. 19 n.6, the court of appeals never addressed the 10(e) issue, addressing the merits instead.

[11] While not stated in its questions presented for review, petitioner asserts that, in fact, it is not a successor to Greenbriar because "there was not a substantial continuity of the same operations." Pet. 19. Petitioner refers to its plan to "radically redesign[], remodel[], and reconstruct[]" the Greenbiar facility, *ibid.*, and to hire additional workers into new job classifications, Pet. 20. The Board, however, found, and the court of appeals agreed, that petitioner's changes, both implemented and projected, "are not so substantial so as to change the nature of the enterprise." Pet. App. A9, A40. To the extent that petitioner may be understood to chal-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1992

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lenge this finding, the issue is fact-bound and does not warrant further review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45439